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89-1816
No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

USX CORPORATION,
Petitioner,

v.

ELBERT G. GREEN and ROBERT DANLEY,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTIONS PRESENTED

1. On remand from this Court for further consideration in light of *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. 2115 (1989), did the Third Circuit, by finding that a multi-component hiring process violated Title VII under the disparate impact theory even though plaintiffs did not identify or statistically isolate any component as the cause for the bottom line disparity, so depart from this Court's mandate as to necessitate review by this Court?

2. On remand from this Court for further consideration in light of *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. 2115 (1989), may a Court in a disparate impact case equate an employer's failure to prove an innocent cause for a bottom line statistical disparity with a failure to *produce* a business justification for the allegedly challenged employment practices?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were the petitioner, USX Corporation, formerly known as United States Steel Corporation, and the respondents, Elbert G. Green and Robert Danley, as class representatives for a class of unidentified, unknown individuals.[1]

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[1]The following is a listing of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of USX Corporation, as required by Rule 28.1 of the Rules of the United States Supreme Court: Athlone Prospecting & Development Corporation, Ltd.; Merinds Mineracao (Partnership); Mineracao Carajas, Ltda. (Partnership); Mineracao Maraba, Ltda. (Partnership); Mineracao Xingu, Ltda. (Partnership); Termerid Mineracao, SA; Torremco Soc. Min. E Com. Ltda. (Partner); Deepsea Ventures, Inc.; Ocean Mining Associates—Joint Venture; USS-POSCO Industries—Partnership; USS/Kobe Steel Company; U.S. Steel France; Compagnie Miniere de l'Ogooue (Comilog); USS Technology (Japan) Ltd.; ACE Holdings, Ltd.; Coda Holding, Ltd. (CODA-H) Corporate Officers & Directors Assurance, Ltd. (CODA); Adela Investment Company, S.A.; Chrome Deposit Corp. (Court Holdings J.V.); La Pointe Iron Company; Societe Des Mines De Fer De Guinee Pour L'Exploitation Des Monts Nimba (Mifergui Nimba); Tilden Iron Mining Company; West Union Canal Company; Zuari Agro Chemicals Ltd.; USS/CHC—Partnership; Transtar, Inc.; Harbert-Trace Crossings; HDTX/USR (Liberty Park); Paschen Contractors-Morrison-Khudsen; Seamgas, Swan Point Associates; West 10th Street Associates; Double Eagle Steel Coating Co.—Joint Venture; Live Oak Uranium Operations; National Oilwell—Partnership; Worthington Specialty Processing; Arctic LNG Transportation Company; Badger Pipe Line Company; CLAM Petroleum Company; Cook Inlet Pipe Line Company; Explorer Pipeline Company; Gravcap, Inc.; Green Bay Terminal Corporation; Kenai LNG Corporation;

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LOCAP, Inc.; LOOP Inc.; Maralou Netherlands Partnership; Oil Insurance Limited; The Pecos Carbon Dioxide Pipeline Company; Petroleum Terminals, Inc.; Platte Pipe Line Company; Polar LNG Shipping Corporation; Tri Star Marketing Inc.; Wake Up Oil Co., Inc.; West Shore Pipe Line Company; Wolverine Pipe Line Company; Triad Terminal Company of Seima; Acadian Gas Pipeline System; Bayou Interstate Pipeline System; Calcasieu Gas Gathering System; Laredo Nueces Pipeline Company; Louisiana Industrial Gas Supply System; Neches Pipeline System; Pelican Interstate Gas System; Pelican Transmission System; Pontchartrain Natural Gas System; Spindletop Gas Distribution System; Alabama Intrastate Supply; Red River Pipeline; Red River Pipeline Corporation; Ozark Finance Corporation; Ozark Gas Transmission System; RMI Titanium Company; and Feralloy Processing Co.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 28.1 LIST	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	10
I. THE THIRD CIRCUIT'S HOLDING THAT USX'S MULTI-COMPONENT HIRING PROCESS VIOLATED TITLE VII UNDER THE DISPARATE IMPACT MODEL BASED ONLY ON ONE SET OF CUMULATIVE STATISTICS IS DIRECTLY CONTRARY TO THIS COURT'S REMAND ORDER AND TO *WARDS COVE* AND RAISES VITALLY IMPORTANT JURISPRUDENTIAL AND LEGAL ISSUES	11
II. THE THIRD CIRCUIT'S HOLDING THAT USX FAILED TO MEET ITS BURDEN OF PRODUCING A BUSINESS JUSTIFICATION FOR THE CHALLENGED PRACTICE JUST BECAUSE IT FAILED TO PROVE THAT A FACTOR OTHER THAN RACE CAUSED THE BOTTOM LINE	

Page

DISPARITY CONFLICTS WITH *WARDS COVE* AND RAISES VITALLY IMPORTANT ISSUES OF EMPLOYMENT DISCRIMINATION LAW..... 17

III. CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Page

Allen v. Seidman, 881 F.2d 375 (7th Cir. 1989) 21

EEOC v. Joint Apprenticeship Committee, 895 F.2d 86 (2d Cir. 1990) 16

Emanuel v. March, 897 F.2d 1435 (8th Cir. 1990) 16

Evans v. City of Evanston, 881 F.2d 382 (7th Cir. 1989) 22

Gilty v. Village of Oak Park, 50 Fair Empl. Prac. Cas. (BNA) 1388 (N.D. Ill. 1989) 16

Harris v. Lyng, 717 F. Supp. 870 (D.D.C. 1989) 16

Lowe v. Commack Union Free School Dist., 886 F.2d 1364 (2d Cir. 1989) 16

Mallory v. Booth Refrigeration Supply Co., Inc., 882 F.2d 908 (4th Cir. 1989) 21

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 21

Wards Cove Packing Co., Inc. v. Atonio, 109 S.Ct. 2115 (1989) ..... passim

Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988) 8, 11, 13, 15, 20

STATUTES

Title VII, Civil Rights Act of 1964, as amended,
42 U.S.C. § 2000e (1982) 10
42 U.S.C. § 2000e-2(a) (1982) 2
28 U.S.C. § 1254(1) (1988) 2
28 U.S.C. § 2101(c) (1988) 2

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review that Court's judgment in *Elbert G. Green and Robert Danley v. USX Corporation, formerly known as United States Steel Corporation*, Nos. 86-1554 & 86-1568.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, from which this appeal is taken, is reported at 896 F.2d 801 (3d Cir. 1990) and appears as Appendix A ("App. A") hereto. The Order of the United States Supreme Court granting USX Corporation's petition for a writ of certiorari, vacating the judgment and remanding the case to the United States Court of Appeals for the Third Circuit for reconsideration in light of *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. 2115 (1989), appears as Appendix B ("App. B") hereto. The opinion of the United States Court of Appeals for the Third Circuit, which this Court vacated and remanded, is reported at 843 F.2d 1511 (3d Cir. 1988) and appears as Appendix C ("App. C") hereto. The opinions of the District Court are reported at 570 F. Supp. 254 (E.D. Pa. 1983) (liability opinion) and 640 F. Supp. 1521 (E.D. Pa. 1986) (damage opinion) and appear, respectively, as Appendix D ("App. D") and Appendix E ("App. E") hereto.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was dated and entered February 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C.

§ 1254(1). This petition is timely under 28 U.S.C. § 2101(c).

STATUTE INVOLVED

This case involves Section 703(a) of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e-2(a):

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This is a race discrimination class action in which the plaintiff class challenged USX Corporation's ("USX")[1] hiring process for production and maintenance ("P&M") jobs

[1]Formerly United States Steel Corporation.

at its large, integrated steel mill in Fairless Hills, Pennsylvania.[2] On June 12, 1989, this Court granted USX's Petition for a Writ of Certiorari, vacated the judgment of the United States Court of Appeals for the Third Circuit, and remanded to the Third Circuit for further consideration in light of *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. 2115 (1989). That remand Order obligated the Third Circuit either to reexamine the record under the standards enunciated in *Wards Cove* or to remand this case to the District Court to make further findings.

The District Court previously found that USX's hiring process had multiple steps, of which the following were significant:

- Individuals interested in employment submitted job applications;
- The employment applications were reviewed and processed by a personnel office employee to select applicants for inclusion in the "ready file"—a pool of preferred applicants;[3]
- When informed by an operating department of a job opening, USX personnel office employees selected

[2]The original named plaintiff, Elbert Green, was held to be an inappropriate class member in the District Court's Order of August 26, 1980. The individual claim of the other named plaintiff, Robert Danley, was abandoned on the first day of trial. LFF 10, 13 (App. D, 71a, 72a). Accordingly, the District Court entered judgment in USX's favor on both Elbert Green's and Robert Danley's individual claims. LCL 1, 2, (App. D, 108a). (As used in this Petition, "LFF" refers to findings of fact in the liability decision; "LCL" refers to conclusions of law in the liability decision; "DFF" refers to findings of fact in the damage decision; "P" refers to a numbered plaintiffs' exhibit; "D" refers to a numbered defendant's exhibit; "Tr. I" refers to the liability trial transcript; "Tr. II" refers to the damage trial transcript; and "J.A." refers to the Joint Appendix.)

[3]LFF 27 and 31 (App. D, 76a and 77a).

applications from the ready file and attempted to contact those applicants to schedule interviews;[4]

- Those applicants who could be contacted, who accepted the invitation to schedule an interview and who showed up for the scheduled interview were interviewed by a personnel office interviewer;[5]

- If the personnel office interviewer judged the applicant potentially suitable, then a foreman from the department that had an opening generally interviewed the applicant;[6] and, finally,

- Applicants were required to pass a physical examination.[7]

In evaluating applicants, each interviewer considered a multitude of criteria, many of which were subjective.[8] In addition, there were three minimum qualifications without which an applicant was ineligible for a P&M job: being

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[4]LFF 32 (App. D, 77a-78a).

[5]LFF 34 and 35 (App. D, 78a). A substantial number of the personnel office interviewers over the class period, as well as the Supervisor of Employment and Placement, were black. Tr. I 311-13 (J.A. 205-07); Tr. I 418-20 (J.A. 220-22); Tr. I 519.

[6]LFF 35 (App. D, 78a). If a foreman rejected an applicant, either USX's Supervisor of Employment or General Supervisor of Personnel reviewed the reasons for the rejection and, if another area of the plant then was hiring, generally referred the applicant to that area. The "overwhelming majority" of those so referred were placed elsewhere in the mill. Tr. I 203-06, 313-16, 426-29 and 474.

[7]LFF 17 (App. D, 73a-74a).

[8]For example, applications were evaluated based on education, work experience, attitude, initiative, personality, alertness, intelligence, physical restrictions, ability to communicate, military experience or training, vocational training, ability to meet work schedules, interest and prior employment history at Fairless Works. *See* LFF 39 (App. D, 79a); P-32 (J.A. 426-27).

eighteen years of age, being able to read safety signs and, as noted above, passing a physical examination.[9]

Applicants could be eliminated from consideration at any stage of the hiring process and, of course, could voluntarily withdraw at any stage.

At trial, the plaintiff class commenced their presentation by dropping claims for any class members who applied during years when USX did very little hiring (1975, 1980 and 1981) or during years when USX hired proportionately more blacks than were present in the applicant flow (1976 and 1977). This eliminated claims for five of the ten class years and left claims for 1972, 1973, 1974, 1978 and 1979.

For these five non-sequential years, plaintiffs' case at trial consisted *only* of (1) three USX personnel employees who explained the hiring process; (2) a statistician who compared the number of blacks initially applying for employment at Fairless and the number of blacks ultimately hired and concluded, *solely on the basis of the disparity between those two numbers*, that USX's overall hiring process had a disparate impact on blacks;[10] and

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[9]LFF 17 (App. D, 73a-74a).

[10]Plaintiffs' statisticians' ultimate conclusion was based solely on the following simple comparison between black applicants and hires in 1972, 1973, 1974, 1978, and 1979:

	% of Black Hires	% Black Applicants
1972 July-Dec.	14.8%	20.3%
1973	16.1%	24.2%
1974	13.1%	21.4%
1978	19.1%	29.1%
1979	19.1%	26.4%

LFF 60 (App. D, 86a).

(3) two individuals who merely testified that they applied and were not hired.[11]

Plaintiffs' own statistician acknowledged that his statistics only eliminated chance as the cause for the disparity and that he made no study of any explanation for the disparity.[12] Most importantly, plaintiffs' expert made no analysis of the various steps in USX's hiring process;[13] rather than studying any specific hiring step and its effect,[14] he skipped over all of the intermediate steps in USX's hiring process and considered only the initial step—applications—and the last step—hires.[15] He further admitted that he neither analyzed nor considered the characteristics or qualifications of any applicants.[16] Nor did he make any analysis of the rate at which persons refused offers of

[11]For example, plaintiffs presented no anecdotal evidence of individual instances of discrimination and no evidence on the treatment of any applicant vis-a-vis another.

[12]*See* P-122 at 10-11, 16 (J.A. 498-99, 504); Tr. I 805-18 (J.A. 233-46); Tr. I 840-43.

[13]*See* Tr. I 805-18 (J.A. 233-46); D-19 (J.A. 587).

[14]Tr. I 805-18 (J.A. 233-46).

[15]*See* D-19 (J.A. 587). Plaintiffs' expert testified at Tr. I 812 (J.A. 239-40) as follows:

> Q. Your principal source of data, which came from the application log begins at step number 2 and compares the application at step number 2 with the hires at step number 12?
>
> A. Yes, Sir.
>
> Q. And you did not attempt to analyze anything in between 3 and 11?
>
> A. That is right.

[16]Tr. I 805-18 (J.A. 233-46); Tr. I 840-43. At Tr. I 805 (J.A. 233), plaintiffs' expert testified:

> Q. If I understand the methodology that you use, you went from a pool of applicants, and you made a determination, without regard to qualifications, right?
>
> A. That's right.

(Continued on next page)

employment or dropped out of the hiring process through no fault of USX.[17]

In addition to attacking plaintiffs' statistical evidence, USX offered relevant labor market data to demonstrate there was no statistically significant disparity between the expected and the actual number of black hires. USX's evidence showed, and the District Court found, that "throughout the class period, US[X] hired minorities for entry-level P&M jobs at rates equalling or exceeding their representation in the geographical labor market . . . ."[18] USX also offered explanations for the cause of any statistical disparity between the number of black applicants and actual hires, citing the different qualifications of the applicants and the higher proportion of blacks than whites who withdrew from consideration during the hiring process.

Although plaintiffs attacked the reliability of USX's statistical evidence in rebuttal, at no point did they present any evidence of any applicant's qualifications or of the dropout rate among applicants. Moreover, they presented absolutely no evidence of other selection devices that would also have served USX's interest in hiring the best qualified without resulting in an undesirable racial effect.

The District Court held that plaintiffs failed to establish a prima facie case of class-wide intentional discrimination under the disparate treatment theory. However, solely on the basis of plaintiffs' gross statistics comparing the number of blacks who initially applied for employment

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(Continued)

See also Tr. I 806 (J.A. 234) ("I didn't consider the education experience, or several other quantities [sic = qualities] that I might have considered, but I did consider applicants for jobs.").

[17]Tr. I 816-17 (J.A. 244-45).

[18]LFF 108 (App. D, 100a).

and the number of blacks ultimately hired, and the mere elimination of chance as the cause for the disparity, the District Court found that plaintiffs had established a prima facie case under the disparate impact model. The District Court reached this result without ever requiring plaintiffs to identify what component of the hiring process they were challenging or prove what actually caused the bottom line disparity.[19]

Once it found a prima facie case had been established, the District Court required USX to validate or otherwise prove the business necessity of all of the criteria used in its hiring process. App. D, 115a-117a. Holding that USX failed to carry that heavy burden, the District Court found USX liable under the disparate impact theory and, following the damage phase of the trial, awarded damages to the unidentified class in the amount of $12,397,928.[20]

On appeal, a panel of the Third Circuit not only affirmed the District Court's disparate impact holding, but also, based on the same gross statistics comparing the number of initial applicants with the number of ultimate hires, reversed the District Court's holding that plaintiffs failed to establish a prima facie case of intentional discrimination and found that USX's articulated reasons for the disparity were pretextual.

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[19]The District Court's decision was issued before this Court decided *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988) and *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. 2115 (1989).

[20]DFF 268 (App. E, 183a). On appeal, the Third Circuit reversed the District Court's refusal to award full prejudgment interest and front pay, and remanded those issues to the District Court for further consideration. If the District Court should award prejudgment interest and front pay in the full amounts plaintiffs are expected to assert on remand, the damages could be approximately $34 million.

On July 23, 1988, USX filed a Petition for a Writ of Certiorari. As previously noted, this Court granted USX's Petition on June 12, 1989, vacated the judgment of the Third Circuit, and remanded to the Third Circuit for further consideration in light of *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. 2115 (1989).

On remand, the same panel of the Third Circuit that decided the vacated decision again affirmed the District Court's holding that USX was liable under the disparate impact theory. On the question whether plaintiffs established a prima facie case, the Third Circuit stated that "the class sufficiently identified the employment interview as a discriminatory hiring practice and established that the interview had a 'significantly disparate impact' on the employment opportunities for black and white applicants"[21]—without citing any evidence or District Court finding that supports that conclusory statement. Then, it proceeded to find that USX had not met its burden to produce evidence of a business justification for its use of interviews simply because USX had failed to prove that the different qualifications or drop-out rates among applicants caused plaintiffs' bottom line statistical disparity. App. A, 9a-10a.

With regard to disparate treatment, the Third Circuit acknowledged that it had erred in its prior decision and affirmed the District Court's ruling that plaintiffs failed to establish a prima facie case of intentional class-wide discrimination.

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[21](App. A, 8a).

REASONS FOR GRANTING THE WRIT

In granting certiorari and deciding *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. 2115 (1989), this Court recognized the fundamental importance in the area of employment discrimination law of the evidentiary standards and burdens of proof applicable under the disparate impact model of Title VII. In its June 12, 1989 Order granting certiorari in this case, this Court instructed the Third Circuit to reconsider its prior decision and to apply *Wards Cove.*

The Court of Appeals flagrantly disregarded that mandate by giving *Wards Cove* only lip service and then acting directly contrary to both of the central holdings of *Wards Cove.* First, the Third Circuit ignored the requirement that plaintiffs identify and prove what employment practice or practices caused the bottom line statistical disparity between black applicants and hires and found USX liable solely on the basis of bottom line statistics. Second, the Third Circuit imposed on USX the burden of proving that innocent factors, not race, caused the bottom line disparity, rather than merely producing a reasonable business justification for the specific employment practice at issue. Thus, rather than apply *Wards Cove*, the Third Circuit merely rubber-stamped its earlier, now vacated, decision.

The Third Circuit's decision is not only contrary to *Wards Cove* and decisions of other circuits that have followed *Wards Cove*, but also its refusal to follow this Court's remand instructions is so contrary to fundamental jurisprudential standards that its decision cannot, consistent with justice, be left to stand as precedent. Only this Court can resolve the conflicts the Third Circuit's decision creates and enforce the authority of this Court in our federal judicial system.

I. THE THIRD CIRCUIT'S HOLDING THAT USX'S MULTI-COMPONENT HIRING PROCESS VIOLATED TITLE VII UNDER THE DISPARATE IMPACT MODEL BASED ONLY ON ONE SET OF CUMULATIVE STATISTICS IS DIRECTLY CONTRARY TO THIS COURT'S REMAND ORDER AND TO *WARDS COVE* AND RAISES VITALLY IMPORTANT JURISPRUDENTIAL AND LEGAL ISSUES.

In *Wards Cove*, this Court held that, as part of their prima facie statistical case, plaintiffs must *identify* the specific employment practice or practices they are challenging *and prove* that the identified practice or practices had a statistically significant adverse impact on a protected group. 109 S.Ct. at 2124-25. *See also Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994-95 (1988). In so holding, this Court explicitly found that a bottom line statistical disparity *will not suffice* to establish a prima facie statistical case. 109 S.Ct. at 2124-25.

Yet a bottom line statistical disparity is all plaintiffs proved. Plaintiffs' statistician candidly admitted that he only compared initial applicant flow with the final hire rate. It is precisely for this reason that the District Court *never found* that any particular employment practice in USX's hiring process resulted in a statistically significant disparity. Surely, if plaintiffs attacked any specific employment practice, there would have been some discussion of this by plaintiffs' statistical expert and/or a finding by the District Court on the effect of that practice. There was neither.

On remand, the Third Circuit reached the same result it had reached earlier by paying only lip service to this

Court's remand instructions and to the record in this case. The Third Circuit's entire discussion on the crucial issue of whether plaintiffs established a prima facie case under *Wards Cove* is only one paragraph long. See App. A, 8a-9a. In that one paragraph, the Third Circuit acknowledged that "plaintiffs challenged a number of USX hiring practices at trial" and that the Third Circuit's now vacated decision "upheld their broad challenge to USX's multicomponent hiring process." App. A, 8a. Yet, in conclusory fashion, the Third Circuit stated that plaintiffs "did present evidence isolating the interview as a discriminatory practice . . . ." App. A, 9a.

Most astoundingly, to support this claim, the Third Circuit cites its vacated decision and states that it "still conclude[s]" the plaintiffs have "sufficiently identified" the interviews as "one component of the USX hiring system that resulted in disparate hiring results." App. A, 9a. The key reference (App. A, 9a) the Third Circuit made to the record—pages 262-64 of the District Court's decision (App. D, 83a-91a) and pages 1517-19 of its own vacated decision (App. C, 24a-27a)—is where each court below summarized plaintiffs' statistician's methodology in arriving at his conclusion that USX's overall hiring process resulted in bottom line disparity in five of the ten class years. That the Third Circuit cites plaintiffs' expert's bottom-line testimony merely bespeaks the result-oriented, conclusory nature of its analysis. Nowhere (in the pages cited or anywhere else in either decision) is there any discussion of the statistical impact of any step of USX's hiring process.[22]

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[22]The only discussion in the District Court's liability opinion of the impact of any part of USX's hiring process concerned USX's practice of giving preference to applicants with relatives in the workforce. The

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Further, there could not have been any such discussion because, as plaintiffs' expert conceded, he made no analysis of any explanation for the overall disparity or of any of the various steps in USX's hiring process (*see supra* note 15, at 6) and merely compared the percentage of blacks who applied with the percentage of blacks who were hired without ever looking at any of the intermediate steps, including either of the interview stages. *See supra* note 10, at 5.[23] Plaintiffs' expert specifically admitted that his studies merely eliminated chance as the cause for the bottom line disparity between the number of black applicants and hires. Yet as this Court explained in *Watson*, "[i]t is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance." 487 U.S. 992. *See also Wards Cove*, 109 S.Ct. at 2125 (quoting *Watson*, 108 S.Ct. at 2787) (The fundamental reason for requiring plaintiffs to identify and statistically isolate each challenged practice was that, "[t]o hold otherwise would result in employers being potentially liable for 'the myriad of

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(Continued)

District Court found that giving a preference to an applicant with a father in the workforce "had a disparate and adverse impact on blacks," LFF 81 (App. D, 92a), but never quantified this adverse impact (and could not do so based on the evidence). The fact that the District Court made findings on the preference for relatives, highlights the lack of any findings concerning interviews.

[23]The Third Circuit recognized in its vacated decision not only that "the district court reached its conclusion with the view that the class's challenge was to the entire hiring practice," (App. C, 36a), but also went on to hold that "the district court's validation of the class's *multicomponent challenge* to USX's hiring system under the disparate impact theory of analysis was proper." *Id.* (emphasis added). *See also* LCL 6 (App. D, 109a) ("Plaintiffs established a prima facie case . . . by their statistical proof that the defendant's *hiring practices* during [five of the ten class] years had a statistically significant disparate and adverse impact on blacks" (emphasis added)).

innocent causes that may lead to statistical imbalances in the composition of their work forces.' ").

In addition to citing plaintiffs' statistician's methodology, the court quoted out of context a general statement by the District Court criticizing USX for using subjective criteria.[24] The fact that interviews are subjective, however, is not "evidence isolating the interview as a discriminatory practice." Otherwise all interviews would effectively be banned unless the employer adopts a quota system to insure the proportionality of all hiring. This is precisely what this Court rejected in *Wards Cove* when it held that a plaintiff under the disparate impact analysis must show that the disparity is the result of the particular employment practice by "specifically showing that each challenged practice has a significantly disparate impact on employment opportunities. . . ." *Wards Cove*, 109 U.S. at 2125.

Significantly, nowhere did the District Court characterize USX's use of subjective criteria as the focus of plaintiffs' disparate impact challenge. Four steps of USX's hiring process involved the application of subjective criteria: the personnel office creation of the ready file; the personnel office determination whom to call to invite to schedule interviews; the personnel office interviews; and the foremen interviews. *See supra* at 3-4.[25] Nowhere in the

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[24]The District Court made this statement in the context of reaffirming its evidentiary ruling precluding USX from supplementing the list of the subjective criteria it considered in making hiring decisions with an additional one—promotability. LFF 110 (App. D, 101a-102a).

[25]The fact that the Third Circuit assumed the bottom line statistics were caused by the "interview process" further demonstrates that it did not review this record under the *Wards Cove* standard. The undisputed record evidence was that any applicant who showed up for a scheduled interview first was interviewed by a USX personnel department interviewer and then, *if they passed that interview*, by a foreman from the

(Continued on next page)

District Court's opinion is there a reference to any statistical evidence or a finding regarding the impact of any of the four subjective steps of USX's hiring process, including the personnel office interview, the foreman interview or both interviews taken together.[26]

Like *Wards Cove,* this case involved a broad scale attack on an entire hiring process with one set of overall statistics. Like *Wards Cove,* plaintiffs pointed accusatorily to any aspect of the challenged hiring process for which they could think of a criticism—including USX's preference for applicants with relatives in the workforce, USX's use of minimum hiring goals and USX's use of subjective criteria[27]—and speculated that they all may have contributed in some way to the overall result. Like *Wards Cove,* plaintiffs never focused their attack on anything but the bottom line result. Therefore, like the plaintiffs in *Wards Cove,* plaintiffs here should have been required to identify and statistically isolate the challenged employment practice. They were not.

In addition to its failure to apply *Wards Cove* as instructed, the Third Circuit's decision stands in conflict

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(Continued)

department that had requisitioned employees LFF 35 (J.A. 66); Tr. I 203, 206, 311-13 (J.A. 205-07).

[26]There is absolutely no basis in the law for any presumption that the subjective interviews were the focus of plaintiffs' challenge or the cause of the overall result. *See, e.g., Watson,* 487 U.S. at 990 ("It is true, to be sure, that an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct."). *See generally Wards Cove,* 109 S.Ct. at 2124-25 (The rule that plaintiffs must identify and statistically isolate each challenged employment practice applies to selection systems that combine subjective and objective criteria).

[27]In *Wards Cove,* the plaintiffs pointed to nepotism, a rehire preference, subjective hiring criteria, separate hiring channels and a practice of not promoting from within. 109 S.Ct. at 2125.

with those other circuits that have followed *Wards Cove* and refused to presume disparate impact discrimination solely on the basis of cumulative statistics. *See, e.g., EEOC v. Joint Apprenticeship Committee*, 895 F.2d 86, 90-91 (2d Cir. 1990) (Remanding a Title VII race and sex discrimination suit in light of *Wards Cove* because "the [district] court thought it unnecessary to determine whether the statistical disparities were caused by the challenged criteria."); *Lowe v. Commack Union Free School Dist.*, 886 F.2d 1364, 1371 (2d Cir. 1989) (In affirming the district court's dismissal of the plaintiff/applicants' disparate impact claim for failure to establish a prima facie case, the court noted that, under *Wards Cove*, the plaintiffs "cannot satisfy the requirements of a prima facie case simply by broadly attacking as discriminatory the hiring process as a whole" and characterized the plaintiffs' statistical proof as "little more than a compilation of the results of the hiring process."), *cert. denied*, 110 S.Ct. 1470 (1990). *See also Emanuel v. March*, 897 F.2d 1435 (8th Cir. 1990) (Holding that the plaintiff established that the use of performance awards caused the overall disparity through statistics demonstrating the disproportionate effect of *that criterion* on blacks); *Gilty v. Village of Oak Park*, 50 Fair Empl. Prac. Cas. (BNA) 1388, 1394 (N.D. Ill. 1989) (The plaintiff cannot establish a prima facie disparate impact case by faulting the entire promotional process); *Harris v. Lyng*, 717 F. Supp. 870 (D.D.C. 1989) (The plaintiff failed to establish a prima facie case because he failed to show the necessary causal connection between the subjective review by an all-white committee and any claimed discrimination).

The Third Circuit, in flagrant disregard of this Court's remand Order, has done precisely what this Court in *Wards Cove* mandated not be done. It, in effect, has

ignored the holding of *Wards Cove* by assuming that the bottom-line disparity was the result of subjective interviews. The Third Circuit came to the same conclusion it had in its earlier vacated decision by ignoring the fact that the District Court had no evidence and made no findings on the effect of any specific employment practice. It attempted to justify its decision by reference to its earlier, vacated decision which relied solely upon the disparity between applicant flow and hire rate. It provided no citation to any evidence of a disparity caused by personnel office interviews, the foreman interviews, or even the interview process as a whole. It is for this Court to require the Third Circuit to apply the controlling precedent of this Court.

II. THE THIRD CIRCUIT'S HOLDING THAT USX FAILED TO MEET ITS BURDEN OF PRODUCING A BUSINESS JUSTIFICATION FOR THE CHALLENGED PRACTICE JUST BECAUSE IT FAILED TO PROVE THAT A FACTOR OTHER THAN RACE CAUSED THE BOTTOM LINE DISPARITY CONFLICTS WITH *WARDS COVE* AND RAISES VITALLY IMPORTANT ISSUES OF EMPLOYMENT DISCRIMINATION LAW.

Having departed from *Wards Cove* by relieving plaintiffs of their burden to prove what caused the bottom line disparity, the Third Circuit remained afield by requiring USX to prove that the bottom line statistical disparity resulted from innocent causes rather than merely requiring it to produce a business justification for the challenged employment practice.

In *Wards Cove*, this Court held:

> [A]t the justification stage of . . . a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer . . . . [T]here is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils we have identified above . . . .
>
> In this phase, the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff . . . . "*[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.*"

109 S.Ct. at 2125-26 (quoting *Watson*, 108 S.Ct. at 2790) (emphasis added and emphasis in the original).

Like its discussion of whether plaintiffs established a prima facie case under *Wards Cove*, the Third Circuit's discussion of whether USX articulated a business justification is also remarkably brief:

> Finally, although *Wards Cove* may have reduced the employer's burden of showing a legitimate nondiscriminatory reason for the challenged practices, we perceive no reason to disturb the district court's and our own, prior rejection of USX's assertion that the subjective criteria enabled it to identify the "best qualified" applicants for the essentially unskilled positions. 570 F. Supp. at 275-76; 843 F.2d at 1529. We still believe that USX's contention that blacks "dropped out" of the hiring process at a higher rate

> than whites was properly discounted by both courts. 570 F. Supp. at 271; 843 F.2d at 1529-30. Although *Wards Cove* may have relaxed the employer's burden to rebut the plaintiff's *prima facie* case, we do not read the decision as requiring us to accept at face value an employer's explanations of the adverse impact of its hiring practices on blacks. As the *Wards Cove* Court stated, "[a] mere insubstantial [business] justification . . . will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices." 109 S.Ct. at 2126.

App. A, 9a-10a.

The Third Circuit did not even purport to examine whether USX had articulated a business justification for the use of interviews in its hiring process. Rather, to find USX liable under the disparate impact theory, the court improperly imposed on USX the "burden to rebut," i.e. disprove, plaintiffs' prima facie case. Relying only on its vacated pre-*Wards Cove* decision, it claimed to have "properly discounted" USX's explanations. Significantly, however, in that vacated decision, the Third Circuit unmistakably used the language of the burden of persuasion, not production:

- "[USX] presented no evidence *demonstrating* that it evaluated applicants non-discriminately . . . .";[28]
- "USX's second articulated rationale for the disparity in hiring is . . . unpersuasive. Its assertion that a disproportionate share of black applicants voluntarily withdrew from the hiring process *is not supported by the evidence of* record.";[29]

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[28](App. C, 51a) (emphasis added).

[29](App. C, 51a-52a) (emphasis added).

- USX justification for the hiring shortfall "*is not supported by the evidence of* record."[30]

Thus the Third Circuit improperly imposed on USX the burden of proof and held that merely because USX failed to prove that innocent factors caused the bottom line disparity, the cause must be presumed to be racial discrimination. This conflicts with the holding in *Wards Cove* that the employer's burden is solely one of production, not proof, and utterly misconstrues the meaning of "business justification." *See also Watson*, 487 U.S. at 992 (plurality opinion) ("It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.").

Had the Third Circuit applied the correct standard, it would have had to address the District Court's findings and conclusions that USX's use of subjective criteria to obtain the best-qualified employees was justified:

> US[X], like any other business entity, has a right, and perhaps a duty to its stockholders and the national economy, to hire the best qualified personnel it can. It is abundantly clear that ability to absorb on-the-job industrial training (which may be assumed to relate to native intelligence, alertness, and judgment) is an important criterion in determining who is best qualified, even for entry-level jobs.[31]
>
> Others of defendant's criteria—"ability to take directions," "alertness," "intelligence," and "ability to communicate," for example—would seem intuitively to be related to ability to absorb on-the-job and classroom instruction, an important and legitimate job

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[30](App. C, 52a) (emphasis added).

[31]LFF 110 (App. D, 101a-102a).

> qualification for entry-level P&M workers; who are expected to learn all or most necessary job skills after they [are] hired, directly from the employer.[32]
>
> [The conclusion that] it was not only reasonable but a necessary business practice for US[X] to attempt to hire the best qualified applicants . . . [is not] controversial.[33]
>
> The defendant, like any employer, has an absolute right to hire the best laborers it can find for its steel plant.[34]

Given these findings, USX articulated a legitimate business justification under *Wards Cove*, 109 S.Ct. at 2125-26. At the very least, however, USX was entitled to a remand on the issue whether it met its burden of production under *Wards Cove*. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

The Third Circuit's holding conflicts not only with *Wards Cove*, but also with decisions of every other circuit that has reached the question whether an employer met its burden of production. *See, e.g., Mallory v. Booth Refrigeration Supply Co., Inc.*, 882 F.2d 908 (4th Cir. 1989) (Holding that, given the district court's finding that the employer's practice of making promotion decisions based on personal observation and subjective criteria was valid, the plaintiffs failed to meet their ultimate burden of proof); *Allen v. Seidman*, 881 F.2d 375, 381 (7th Cir. 1989) (Remanding the issue of the challenged employment practice's business relatedness because the district court's rejection of the employer's business necessity defense was "the language of the burden of persuasion not production, and

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[32](App. D, 117a-118a).

[33]LFF 111 (App. D, 102a-103a).

[34](App. D, 115a).

the burden of persuasion was placed on the wrong party, the employer."); *Evans v. City of Evanston*, 881 F.2d 382, 385 (7th Cir. 1989) (Remanding the case because, even though the employer's job-relatedness defense was "[s]o feeble . . . that it can be argued the city did not carry its burden of production," the district court used the language of burden of persuasion and, therefore, wrongly placed the burden of persuasion on the employer instead of the plaintiff).

III. CONCLUSION

Orders of this Court vacating circuit court decisions and remanding them for further consideration in light of a Supreme Court decision mean nothing if circuit courts can violate such Orders by ignoring the Supreme Court precedent with absolute impunity. The Third Circuit violated this Court's remand Order and misapplied *Wards Cove*. Only this Court can insure that its prior remand Order had meaning and that the central holdings of *Wards Cove* will be applied in the Third Circuit.

Petitioner accordingly requests that this Court grant certiorari in this case.

Respectfully submitted,

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APPENDIX A

Filed February 23, 1990

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 86-1554 & 1568

GREEN, ELBERT G., and DANLEY, ROBERT
Individually and as representatives
of persons similarly situated

v.

USX CORPORATION, formerly known as
UNITED STATES STEEL CORPORATION
Appellant No. 86-1554

GREEN, ELBERT G., and DANLEY, ROBERT
Individually and as representatives
of persons similarly situated
Appellants No. 86-1568

v.

USX CORPORATION, formerly known as
UNITED STATES STEEL CORPORATION

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil Action No. 76-3673)

(On Remand from the United States Supreme Court)
Argued November 8, 1989
Before: HIGGINBOTHAM, *Chief Judge,**
MANSMANN and ROSENN, *Circuit Judges.*
(Filed February 23, 1990)

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*Honorable A. Leon Higginbotham, Jr., became Chief Judge of the Third Judicial Circuit on January 16, 1990.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Chief Judge.*

This is an employment discrimination class action brought under 42 U.S.C. § 2000e (1982) ("Title VII"), and 42 U.S.C. § 1981 (1982). The plaintiffs-appellants ("plaintiffs" or "class") are a class of black persons who unsuccessfully sought employment at the Production and Maintenance Department of the Fairless Hills, Pennsylvania plant of defendant-appellee USX Corporation ("USX"), formerly known as United States Steel Corporation. After a December 1982 trial on liability issues,[1] the United States District Court for the Eastern District of Pennsylvania determined that USX was liable under plaintiffs' disparate impact theory of liability, but was not liable under their disparate treatment theory. *Green v. United States Steel Corp.*, 570 F. Supp. 254 (E.D.Pa. 1983). On appeal, this court affirmed the district court's finding of liability on the disparate impact theory, and held that the district court erred in concluding that plaintiffs failed to make out their disparate treatment claim. *Green v. USX Corp.*, 843 F.2d 1511 (3d Cir. 1988). On June 12, 1989, the United States Supreme Court vacated our decision and remanded this case for further consideration in light of *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115 (1989). *USX Corp. v. Green*, 109 S.Ct. 3151 (1989).

For the reasons that follow, we believe that *Wards Cove* does not undermine the district court's finding of

[1]Trial on damages was held in April 1986, and the district court entered a damages award on August 1, 1986. *Green v. United States Steel Corp.*, 640 F. Supp. 1521 (E.D.Pa. 1986).

liability on plaintiffs' disparate impact theory. However, upon reconsideration, we will affirm the district court's summary judgment in favor of USX on the plaintiffs' disparate treatment claim.

I. BACKGROUND

The facts and procedural history of this case were fully set out in the prior opinions of this court and the district court, an exercise that we need not repeat in detail here. Instead, we shall focus on the rationale underlying our previous opinion, which we are now compelled to reexamine.

In our prior opinion, we rejected USX's contention that disparate impact analysis is inapplicable to challenges to a multicomponent hiring system that utilizes subjective criteria. We stated:

> USX asks us to disregard the fact that a statistically significant discriminatory result occurred as the result of its hiring practices, and focus only upon the fact that the class is unable to isolate a single offensive component. We cannot conclude that this is a proper balance of the burdens between employees and employers in such cases, or that it is the result contemplated by Congress, or by the Supreme Court in its interpretation of Title VII.

843 F.2d at 1521-22. Although we were persuaded that the class had "sufficiently identified the interview process as one component of the USX hiring system that resulted in the disparate hiring results", we also upheld the plaintiffs' challenge to USX's entire multicomponent hiring system. *Id.* at 1523.

We also rejected USX's argument that disparate impact analysis is inapplicable to a challenge to a hiring

process which includes subjective criteria. The court was not persuaded that there was a "well-reasoned distinction between objective criteria that present barriers to employment opportunities for blacks, and subjective criteria that lead to the same results. . . ." *Id.* at 1525. The exclusion of subjective criteria from the disparate impact anaylsis, we held, would encourage employers to use a wide range of subjective criteria "without ever articulating these criteria clearly or, more importantly, without validating their necessity to the selection procedure." *Id.* at 1525. We did not consider that requiring an employer to defend a challenge to its subjective hiring criteria constituted an onerous burden, since the employer could be presumed to have superior knowledge of its own employment practices.

We also held that the district court had erred in concluding that plaintiffs had not made out a *prima facie* case under their disparate treatment theory. We considered that the district court had used an impermissibly high, "smoking gun" standard of intent in making this determination. In our view, the *prima facie* showing of discriminatory intent was made out by the employer's awareness of a significant racial disparity in hiring, its use of "unguided subjective criteria," and its failure to maintain required employment records to monitor its compliance with a consent decree entered in a previous employment discrimination action. We further held that USX had not rebutted the plaintiffs' *prima facie* disparate treatment case with a legitimate, non-discriminatory reason for the challenged practices. *Id.* at 1526-27.

II. DISCUSSION

A. Disparate Impact

In *Wards Cove*, plaintiffs challenged a number of employment practices at Alaskan salmon canneries, including nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, and a practice of not promoting from within. Plaintiffs asserted that these practices caused unskilled, low paying jobs to be filled predominantely by non-whites, and skilled, higher paying jobs to be filled by whites.

The Supreme Court held that the plaintiffs had not made out a *prima facie* disparate impact claim with their simple statistical comparison between white and non-white cannery workers. Rather, "[t]he 'proper comparison [is] between the racial composition of [the at-issue] jobs and the racial composition of the qualified . . . population in the relevant labor market.'" 109 S.Ct. at 2121 (quoting *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977)). Alternatively, where labor market statistics are unavailable, "certain other statistics—such as measures indicating the racial composition of 'otherwise-qualified applicants' for at-issue jobs—are equally probative for this purpose." *Id.*

In *Wards Cove*, the Supreme Court also further defined the Title VII plaintiff's burden of proving causation in a disparate impact case, and discussed the employer's "business justification" rebuttal defense. The Court held that the plaintiff may not make out a *prima facie* discrimination case simply by showing a bottom line racial imbalance in the work force, or by identifying a number of allegedly discriminatory employment practices. Instead, the plaintiff must "demonstrate that the [racial]

disparity . . . is the result of one or more of the employment practices that they are attacking . . . , specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites." *Id.* at 2125. Once the plaintiff has made out a *prima facie* disparate impact claim, "the case will shift to any business justification [that employers] offer for their use of [the challenged] practices." *Id.* The Court explained that "[t]he touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice." *Id.* at 2126. The Court emphasized that the "challenged practice [need not] be 'essential' or 'indispensable' to the employer's business for it to pass muster. . . ." *Id.*

Of course, the plaintiffs could not have anticipated at trial the significant changes in employment discrimination law enunciated in *Wards Cove.* However, we believe that the evidence presented at trial was sufficient even under the *Wards Cove* standards to establish USX's liability under the plaintiffs' disparate impact theory.

First, we do not accept USX's contention that *Wards Cove* invalidates the plaintiffs' use of applicant flow data to establish their *prima facie* disparate impact case. In *Wards Cove,* the plaintiffs' statistical evidence consisted of a comparison of the racial composition of employees in unskilled and skilled positions, without consideration of the racial composition of the qualified labor pool for the at-issue positions. The Court rejected this approach, stating that a comparison between the racial composition between the *qualified* persons in the labor market and the racial composition of the population holding the at-issue jobs "generally forms the proper basis for the initial inquiry in a disparate impact case." 109 S.Ct. at 2121. However, the Court did

not rule out other types of statistical evidence of discrimination, "such as measures indicating the racial composition of 'otherwise qualified applicants' for at-issue jobs. . . ." *Id.*

Unlike the plaintiffs in *Wards Cove,* the plaintiffs' statistical evidence in this case dealt only with the employer's employment record for unskilled positions.[2]

We believe that the plaintiffs' use of applicant flow data was an appropriate means of demonstrating the disparate impact of USX's hiring practices for those positions. The nature of the positions is that initially any able-bodied person should be competent to perform the job. Applicant flow data accurately reflects the pool of qualified candidates. Thus, *Wards Cove's* concern about improper statistical comparison is not implicated here, since there is little danger that applicant flow data for *unskilled* positions would indicate racial disparity in hiring that is, in fact, attributable to the employer's non-race based consideration of the applicants' skills.

We also conclude that the class sufficiently identified the employment interview as a discriminatory hiring practice, and established that the interview had a "significantly disparate impact" on the employment opportunities for black and white applicants. It is true that the plaintiffs challenged a number of USX hiring practices at trial, and it is also true that this court upheld their broad challenge to USX's multicomponent hiring process. 843 F.2d at 1523.

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[2]The district court found that the production and maintenance jobs at issue required no special skills, training, or background. As the court stated, eligible applicants "had to be at least 18 years old, pass a physical examination, and be able to read safety signs (a requirement so minimal that defendant's witnesses could recall no one ever having failed to meet it)." 570 F. Supp. at 257.

However, the plaintiffs did present evidence isolating the interview as a discriminatory employment practice, as was recognized by both the district court and this court. The district court found that "the process by which [USX] divined who, among its applicants, were the best qualified was wholly subjective, consisting essentially of combining the gut reactions to the applicant of employees in the personnel office and one or more foremen in the plant." 570 F. Supp. at 269.[3] On appeal, this court noted, and we still conclude, that "the class has sufficiently identified the interview process as one component of the USX hiring system that resulted in disparate hiring results." 843 F.2d at 1523. The evidence establishes that the subjective interviews had a significantly disparate impact on blacks, as the percentage of successful black interviewees was significantly less than the overall percentage of successful interviewees. *See* 843 F.2d at 1517-19; 570 F. Supp. at 262-64.

Finally, although *Wards Cove* may have reduced the employer's burden of showing a legitimate, nondiscriminatory reason for the challenged practices, we perceive no reason to disturb the district court's and our own, prior rejection of USX's assertion that the subjective criteria enabled it to identify the "best qualified" applicants for the essentially unskilled positions. 570 F. Supp. at 275-76; 843 F.2d at 1529. We still believe that USX's contention that blacks "dropped out" of the hiring process at a higher rate than whites was properly discounted by both courts.

[3]We previously noted, and continue to hold, that because "subjective practices such as interviews are just as capable of operating to hinder the employment opportunities of blacks as are tests or other presumptively objective criteria," subjective hiring criteria are an appropriate subject for disparate impact analysis. 843 F.2d at 1525; *see also* Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777, 2787 (1988) ("[S]ubjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.")

570 F. Supp. at 271; 843 F.2d at 1529-30. Although *Wards Cove* may have relaxed the employer's burden to rebut the plaintiff's *prima facie* case, we do not read the decision as requiring us to accept at face value an employer's explanations of the adverse impact of its hiring practices on blacks. As the *Wards Cove* Court stated, "[a] mere insubstantial [business] justification . . . will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices." 109 S.Ct. at 2126.

B. Disparate Treatment

The district court rejected the plaintiffs' disparate treatment claim, holding that the class had failed to make out a *prima facie* case of intentional discrimination. 570 F. Supp. at 277. The court found that the plaintiffs had failed to "prove that the defendant intentionally had habitually discriminated against blacks on the basis of their race." *Id.* The district court determined that although USX officials were aware that the company's hiring practices had a disparate and adverse effect on black applicants, the officials were acting in the erroneous belief that they were complying with anti-discrimination laws.

On appeal, this court reversed the district court's disparate treatment holding. We considered that the plaintiffs had made out their *prima facie* case by showing the statistical disparity in hiring and USX's use of "unguided, subjective criteria that were never validated as essential to USX's employment practice, or determined to be nondiscriminatorily applied." 843 F.2d at 1528. We further determined that USX had not met its burden of rebutting the plaintiffs' *prima facie* showing with a legitimate, nondiscriminatory reason for its hiring practices. We rejected as

unsupported by the record USX's explanation that the disproportional hiring was the result of the class members' lesser qualifications and their greater propensity to "drop out" of the hiring process. Accordingly, we held that USX was liable on the disparate treatment theory of liability.

Upon reconsideration, in view of the Supreme Court's imposition of an increasing burden of proof on civil rights plaintiffs, we conclude that we erred in our prior disparate treatment holding, and will now affirm the district court's ruling on this issue.[4] In *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), a Title VII action challenging an employer's seniority system,[5] the Supreme Court held that the issue of an employer's discriminatory intent in establishing a seniority system "is a pure question of fact, subject to [Fed. R. Civ. P.]52(a)'s clearly-erroneous standard.

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[4]The Supreme Court's remand directive might reasonably be construed as a requirement to reexamine our previous opinion only in light of the disparate impact analysis of *Wards Cove*. However, we note that USX's certiorari petition raised the *Pullman* issue. In any event, we do not believe that when the Supreme Court directs reconsideration of a lower court decision, the lower court is necessarily limited in its analysis to the explicit grounds set forth in the remand order. Our judicial responsibilities, and our obligations to the parties, require us on remand to correct what we now think the Supreme Court would consider to be a significant error in our original opinion.

[5]Although the plaintiffs in this case do not challenge USX's seniority system, the disparate treatment analysis in *Pullman* is generally applicable to the present disparate treatment claim. Under § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), it is not an unlawful employment practice for an employer to provide different employment standards pursuant to a bona fide seniority system "provided that such differences are not the result of an intention to discriminate because of race." The Supreme Court has consistently interpreted § 703(h) to require a proof of disparate treatment, not simply disparate impact, to invalidate a seniority system under Title VII. *Pullman*, 456 U.S. at 277; *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977).

It is not a question of law and not a mixed question of law and fact." *Id.* at 287-88. The Court explained that:

> [d]iscriminatory intent here means actual motive; it is not a legal presumption ot be drawn from a factual showing of something less than actual motive. Thus, a court of appeals may only reverse a district court's finding of discriminatory intent if it concludes that the finding is clearly erroneous under Rule 52(a).

Id. at 289-90.

This court has consistently applied the clearly erroneous standard to the trial court's factual determinations concerning discriminatory intent. *See, e.g., Equal Employment Opportunity Comm'n v. Metal Service Co.,* No. 89-3322, slip op. at 7 (3d Cir. Jan. 3, 1990)(Title VII race discrimination claim); *Robinson v. Lehman,* 771 F.2d 772, 780 (3d Cir. 1985)(same); *Goss v. Exxon Office Systems Co.,* 747 F.2d 885, 888 (3d Cir. 1984) (Title VII sex discrimination claim); *Duffy v. Wheeling Pittsburgh Steel Corp.,* 738 F.2d 1393, 1396 (3d Cir.)(age discrimination claim), *cert. denied,* 469 U.S. 1087 (1984). In our previous decision, however, we reviewed the district court's disparate treatment analysis under a plenary standard, determining that what was at issue was the district court's application of the appropriate legal standard of discriminatory intent, rather than its factual findings on this issue. 843 F.2d at 1526 n.12.

Upon reexamination, we now conclude that the district court's rejection of the plaintiffs' disparate treatment claim was based not upon a misreading of the governing legal standard, but upon a proper evaluation of the evidence concerning USX's motivation in establishing its hiring procedures. As noted in our prior opinion, some of the district court's language suggested that it was imposing "a

much more onerous burden upon the class than the Supreme Court has required for the establishment of a *prima facie* case of disparate treatment." *Id.* at 1526. However, at bottom, the district court's rejection of the disparate treatment claim was based on its factual finding that USX had set its hiring goals "in the sincere, though erroneous, belief that they were fulfilling the company's obligations under the anti-discrimination laws thereby, and not with any invidious purpose of disadvantaging black applicants." 570 F. Supp. at 277. We cannot say that the district court's finding in this regard is clearly erroneous.

Although we now affirm the district court's rejection of the plaintiff's disparate treatment claim, we continue to adhere to our prior admonition that under the disparate treatment standards enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the evidence of discriminatory intent sufficient to make out a *prima facie* disparate treatment case "need not be so direct and uncontrovertible as 'smoking gun' evidence to compel a *rebuttal* by the defendant, and to require that the rebuttal be substantive and not mere pretext." *Green*, 843 F.2d at 1526 (emphasis in original). The disparate impact of the employer's challenged actions may be a highly relevant consideration in the evaluation of a disparate treatment claim. Indeed, the *Pullman* Court expressly recognized that the discriminatory effect of an employment practice is "part of the evidence to be considered by the trial court in reaching a finding on whether there was . . . discriminatory intent as a factual matter." 456 U.S. at 289.

C. Remaining Issues

In our initial opinon, we concluded that the district court erred in its rationale concerning prejudgment interest and front pay, and remanded for rehearing on those issues. We also affirmed the district court's class certification rulings, and its determination that summer applicants were properly included in the class to whom liability is owed. We see nothing in *Wards Cove* or elsewhere that requires us to disturb those holdings. Accordingly, we will reinstate our previous opinion to the extent it deals with the above issues.

III. CONCLUSION

For the foregoing reasons, we will affirm the district court's judgment as to the plaintiffs' disparate impact and disparate treatment theories of discrimination. We will also reinstate our previous opinion to the extent noted in Part II.C. of this opinion. Accordingly, we will affirm that part of the judgment in which the district court ruled that class certification was proper, and that summer applicants were properly included in the class to whom liability is owed. We will also affirm the district court's damage award, except to the extent that the district court denied prejudgment interest and front pay. We will remand for further proceedings, in accordance with the reinstated portions of our previous decision, on those damages issues.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 12, 1989

Mr. Leonard L. Scheinholtz
435 Sixth Avenue
James H. Reed Building
Pittsburgh, PA 15219

Re: USX Corporation, fka United States Steel Corporation,
V. Elbert G. Green and Robert Danley, etc.
No. 88-141

Dear Mr. Scheinholtz:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of Wards Cove Packing Company, Inc. v. Atonio, 490 U.S. ____ (1989).

Very truly yours,
Joseph F. Spaniol, Jr., Clerk

Joseph F. Spaniol, Jr.

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 86-1554 & 86-1568

GREEN, ELBERT G., and DANLEY, ROBERT
Individually and as representatives of persons similarly situated
Appellants in No. 86-1568

v.

USX CORPORATION, formerly known as UNITED STATES STEEL CORPORATION
Appellant in No. 86-1554

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil Action No. 76-3673)

Argued March 16, 1987
Before: HIGGINBOTHAM, MANSMANN and ROSENN, *Circuit Judges.*
(Filed March 29, 1988)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This appeal and cross-appeal arise from the district court's decision in an employment discrimination class action that was brought under 42 U.S.C. §§ 2000e *et. seq.* (1982) ("Title VII"), and 42 U.S.C. § 1981 (1982) ("§ 1981"). The named plaintiff-appellants, Elbert G. Green and Robert Danley, brought that action on behalf of the class of black persons ("the class"), who had unsuccessfully sought employment in the Production and Maintenance ("P & M") Department of the Fairless Hills, Pennsylvania plant of the United States Steel Corporation ("USX").[1]

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[1]At the time the lawsuit was filed, the defendant-appellant was known as the United States Steel Corporation. It has since that time changed its name to the USX Corporation. For convenience and clarity of reference, the corporation is herein referred to as USX.

The class appeals the district court's denial of recovery to its members under the disparate treatment theory of discrimination. Additionally, the class asserts that the measure of damages that the district court awarded was inadequate.

On its cross-appeal, USX contends that the district court erred by its determination that it was liable to the class under the disparate impact theory of discrimination. It also alleges error in the district court's certification of the plaintiff class, and in the ultimate relief that the district court granted.

We have considered each of these contentions, and will affirm the decisions of the district court in significant part. Specifically, we will affirm the district court's findings regarding USX's liability for unlawful discrimination under disparate impact analysis, in violation of Title VII. We will also affirm the district court's certification of the plaintiff class and its award of injunctive relief. Further, we conclude that the district court's decision included a finding of liability against USX regarding applicants for summer positions, and that this finding was not clearly erroneous. Therefore, we will affirm the district court's award of damages to summer employees.

The district court erred, however, in its conclusion that the class failed to establish a *prima facie* case of discrimination under Title VII. The district court misconstrued the applicable standard established by the Supreme Court regarding intent in this type of discrimination suit, and therefore its conclusion of law that the class failed to make a *prima facie* showing of disparate treatment was in error. Accordingly, we will reverse that part of the district court's decision that found in favor of USX on the issue of liability under disparate treatment analysis.

Our finding of liability on this theory does not affect the damage award made by the district court. In our view, the district court exercised sound judgment in its adjudication of principal damages that resulted from USX's discriminatory hiring during the class period, and its decision need not be disturbed on the basis of our finding that an additional theory supports USX's liability.[2] We will reverse on different grounds, however, the conclusions that the district court reached regarding prejudgment interest and front pay. As to these issues, the rationale that the district court employed to support its findings was erroneous.

Accordingly, we will affirm the damage award in part, vacate in part and remand for proceedings consistent with this opinion.[3]

I. FACTS

The factual basis giving rise to these appeals is essentially uncontroverted. Class member Elbert Green, a black man, unsuccessfully applied for employment as a laborer in the P & M Department of USX on April 11, 1973. Following the rejection of his application, he timely filed a

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[2]The class conceded that a reversal by this Court of the district court's holding regarding liability under the disparate treatment theory does not by itself require alteration of the damage award. Transcript of Proceedings of March 16, 1987 ("Oral Argument Transcript") at 11. It argued, however, that reversal of the district court's award judgment was nonetheless warranted for two reasons: first, because the district court's conclusion that no disparate treatment had occurred caused it also erroneously to deny the class's claim for prejudgment interest; and second, because failure by this Court to reverse would permit the continued vitality of erroneous precedent, *Id.* at 12-16.

[3]USX also appeals from the district court's decision awarding fringe benefits. In our view, the district court's findings on this issue fell within the purview of sound discretion and therefore will be affirmed.

charge of race discrimination with the Equal Employment Opportunity Commission ("EEOC"). Upon receipt from the EEOC of a notice of the right to sue, Green initiated this action and alleged violations of both Title VII and § 1981.[4]

A. The Hiring Process

The focus of the class's challenge was upon the manner by which new P & M laborers were selected. The P & M department was the largest at USX and accounted for almost the entire percentage of initial hiring into the USX Corporation. *See Green v. United States Steel Corp.*, 570 F.Supp. 254, 257 (E.D. Pa. 1983) (Findings of Fact ¶ 15) (P & M hiring constituted 95% of new hires). The stated criteria for employment in P & M unskilled positions were minimal. USX required only that potential P & M employees be eighteen years old, pass a physical examination and be sufficiently literate to read safety

[4]Initially, Green became an unnamed party in the plaintiff class of a similar lawsuit, Dickerson v. United States Steel, 439 F.Supp. 55 (E.D. Pa. 1977). For reasons insignificant to this appeal, the sub-class of which Green was a member was severed from that suit, and it maintained the action from which this appeal is taken, with Green and subsequently Robert Danley as the class's named representative. Danley succeeded Green as the sole named representative of the plaintiff class in this action pursuant to the Class Certification Order, entered by the district court on August 26, 1980, in which the district court concluded that Green could not serve as the class's representative because Summary Judgment had been entered against him, in favor USX on the ground that Green had falsified information on his employment application. The court determined that the issue left to Green—"whether USX had uniformly and nondiscriminatorily rejected applicants who falsified their job applications," was narrow and atypical, and therefore did not merit class treatment. Green v. United States Steel Corp., 570 F.Supp. 254, 256 (E.D. Pa. 1983) (Findings of Fact ¶ 10).

signs.[5] *Id.* (Findings of Fact ¶ 17). USX's view of the requirements for P & M jobs reflected its intent that the criteria not be highly selective. The district court found that USX, in newspaper advertisements for P & M laborers, stated that "no experience was necessary" and that the only requirement was "common sense and a desire to work." *Id.* at 258 (Findings of Fact ¶ 18). Any training or instruction necessary to the performance of the jobs was provided by USX on the job.

Prospective P & M laborers were required to complete written applications in which they listed basic background information regarding their educations, prior work experiences and physical conditions. Applicants were also requested to list the names of any relatives who were current or previous USX employees. USX evaluated each of these factors and used them in the decision whether to employ. USX collected these applications on a continuing basis and recorded them in a file known as the Job Application Log ("JAL"). Particular information from each applicant's file, including his or her name, race and sex was placed on the JAL. It appears that the applicants for summer employment were separated from other applicants and entered into a different JAL.

USX employment supervisors periodically reviewed new applications and denoted certain ones (*e.g.*, those in which the applicant had listed a relative at USX) for special consideration. Applications marked in this way were given preference over the other applications and moved immediately into the "ready file." Applicants in the ready file were scheduled for interviews. *Green*, 570 F.Supp. at

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[5]Significantly, the district court noted that USX was unable to produce any witness who recalled a single instance of someone having failed to meet these criteria.

259 (Findings of Fact ¶ 27). Applications that were not immediately marked as ready were placed into a general application file, and the applicants were categorized according to factors such as race, sex and prior military experience. By this categorization, USX attempted to identify applicants who were in "protected classes" according to EEOC guidelines, for later reference when moving applications from the general file to the ready file. Clerks who maintained the JAL and ready files were instructed to "maintain a good mix" of applicants in the ready file. USX's personnel supervisor testified that he had instructed clerks that 20-30% of those persons ultimately interviewed should be minorities. *Id.* (Findings of Fact ¶ 31).

Hiring was prompted by requests for additional personnel submitted by USX's various department heads. When such a request was made, the personnel clerks selected a number of the applicants from the ready file that they believed would yield the requested number of new employees. These applicants were then invited to interview. The interview process was two-fold. First, the applicant was interviewed by someone from the personnel department, and then by the foreman of the particular department that had requested additional personnel. The department foreman, however, had authority automatically to reject or accept the applicant after the interview. USX policy required that records of these interviews be kept, and that each decision to reject an applicant be accompanied by an explication of the rationale for the decision. These requirements were largely ignored, however, and few records were actually made. *Green*, 570 F.Supp. at 261 (Findings of Fact ¶ 50). Moreover, the interview sheets that were completed for unsuccessful applicants were ultimately destroyed by USX. *Id.* (same).

None of USX's personnel or foremen interviewers were given any formal instruction regarding the evaluation of candidates or the implementation of employment criteria. *Green*, 570 F.Supp. at 260 (Findings of Fact ¶¶ 37, 39). Also, there was no minimum education or work experience requirement for persons hired to do personnel interviews. USX presented evidence that showed that it gave its interviewers only broad guidelines on which to base their determinations. On this point, the district court found that,

> [w]hen making hiring decisions, . . . interviewers evaluated applicants using the following criteria: education; work experience; attitude; initiative; personality; ability to take directions; alertness; intelligence; physical fitness (that is, physical restrictions); ability to communicate; military experience or training; vocational training; ability to meet work schedules; prior criminal record; familiarity with industrial or factory work; interest; prior employment history at Fairless Works; personal references; citizenship or alien status; having a relative in the [USX] work force; and age.

Id. (Findings of Fact ¶ 39).

The district court noted that the majority of these criteria were evaluated in a wholly subjective fashion. Regarding those criteria that were susceptible to objective measurement, "such as education and work experience, [USX] employed no uniform system in assessing one applicant's qualifications vis-a-vis another's." *Green*, 570 F.Supp. at 260 (Findings of Fact ¶ 39). Significantly, at no point did USX ever validate the hiring criteria that it used, nor did it ever ascertain whether those criteria were job-related. The district court found that, "contrary to the

requirements of its own personnel policies, [USX] maintained no system to determine whether its subjective hiring criteria were being fairly and nondiscriminatorily applied to all applicants." *Id.* (Findings of Fact ¶ 44).[6]

B. Evidence Regarding The Disparity

The class argued that the hiring system utilized by USX had a demonstrably adverse impact on black applicants and, further, that USX was aware of this impact and intentionally refused to alter the system to avoid the discrimination that resulted from its use. The class alleged, therefore, that USX was liable to the class under the "disparate impact" theory of discrimination established by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), and *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (*"Teamsters"*), and also under the "disparate treatment" theory as established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

In support of its disparate treatment claim, the class presented statistical evidence of the disparity between whites and blacks in the USX hiring practice that was generated by a study completed by statistics expert, Dr. Samuel Litwin. Using information derived from USX's applicant and employment records, and from the Affirmative Action Quarterly Reports ("AAQR's") filed by USX,

[6]This failure by USX to evaluate critically the hiring policies that it used violated the terms of a consent decree that it had entered as the result of prior litigation. Under this decree, USX was obligated not to use "employee selection criteria 'unless such procedures have been validated in accordance with the Equal Employment Opportunity Commission's "Guidelines on Employee Selection Procedures" (29 C.F.R. § 1607).'" 570 F.Supp. at 260 (Findings of Fact ¶ 42) (citations omitted).

Dr. Litwin determined that, between 1971 and 1982, 49,585 applications for P & M positions were received by USX. Of those applicants, 12,857 (25.9%) were black. *Green,* 570 F.Supp. at 262 (Findings of Fact ¶ 57). This data was analyzed for each year of the class period:

YEAR	TOTAL APPLICATIONS	BLACK APPLICATIONS	%BLACK
1971	1,210	280	23.1%
(July-Dec)			
1972	3,953	801	23.1%
1972	5,059	1,222	24.2%
1974	8,985	1,925	21.4%
1975	1,328	267	20.1%
1976	7,022	2,223	31.8%
1977	5,119	1,389	27.1%
1978	10,191	2,969	29.1%
1979	6,665	1,762	26.4%
1980	23	6	26.1%
1981	26	3	26.1%
1982	4	0	0
All Years	49,585	12,875	25.9%

Dr. Litwin's study showed that, during the class period, USX hired 5,516 persons into the P & M Department. Ninety-five percent of these hires were for the unskilled laborer positions at issue in this action. The study also determined that 972 (17.6%) of the persons that USX hired during this period were black.

YEAR	TOTAL HIRES	BLACK HIRES	%BLACK HIRES	%BLACK APPLICANTS
1972 (July-Dec)	609	90	14.8%	20.3%
1973	1,781	287	16.1%	24.2%
1974	1,249	164	13.1%	21.4%
1975	6	2	33.3%	20.1%
1976	253	107	42.3%	31.8%
1977	240	63	26.2%	27.1%
1978	769	147	19.1%	29.1%
1979	582	111	19.1%	26.4%
1980	1	0	0	26.1%
1981	26	1	3.8%	11.5%
1982	0	0	0	0
All Years	5,516	972	17.6%	25.9% (inc. 1971)

Using a standard deviation of 1.64 as the measure of statistical significance, Dr. Litwin evaluated the data regarding USX's hiring practices under four different methods of analysis. By the use of these methods, Dr. Litwin adjusted his analysis to take into account variations that could have affected the accuracy of his conclusions. The first method that he employed ("Method A") compared the ratio of black hires and applicants with the ratio of white hires and applicants. The second ("Method B") computed the expected number of black hires overall in proportion to the number of blacks in the applicant pool. The final two methods ("Method C" and "Method D") examined the timing of applications in relation to the time that hiring decisions were actually made. Each of these methods produced results demonstrating that USX's hiring practice had a statistically significant adverse impact

upon blacks.[7] Under Method A, Dr. Litwin concluded that the shortfall in USX's hiring of blacks ranged between -5 and -11 standard deviations below the expected values. Under Method B the shortfall was more than -14 standard deviations. Under Method C the deviation ranged between -4 and -8, and under Method D the deviation was approximately -6. *Green*, 570 F.Supp. at 263-64 (Findings of Fact ¶¶ 67-74).

C. The District Court's Decision

The district court considered the rebuttal evidence offered by USX and concluded that USX had failed adequately to explain the shortfalls in the hiring of blacks. *Green*, 570 F.Supp. at 272 (Findings of Fact ¶ 132). After making extensive findings of facts, the district court concluded that USX's "hiring practices had a statistically significant disparate and adverse impact on blacks," *id.* (Conclusions of Law ¶ 6), and, therefore, that USX was liable to the class under the disparate impact theory. *Id.* at 275 (Conclusions of Law ¶ 7). The district court concluded, however, that USX had not engaged in intentional discrimination and, accordingly, found in the company's behalf on the disparate treatment claim.

As the result of its conclusions, the district court ordered a second trial to determine the appropriate measure of damages. Following more than two years of discovery, that trial took place in April, 1986. At its conclusion, the district court awarded damages to the class in the

[7]The district court concluded that these results were sufficiently supported by the data and methods that Dr. Litwin employed. Neither that finding, nor the statistical conclusions that Dr. Litwin reached, are challenged on this appeal. A detailed discussion of the analytical methods that Dr. Litwin employed is included in the district court's liability opinion. See *Green*, 570 F.Supp at 263-65.

amount of $ 12,397,928, which represented mitigated back pay and fringe benefits only. *Green v. United States Steel Corp.*, No. 76-3673, mem. op. at 64 (E.D. Pa. Aug. 1, 1986) ("Damages Opinion") (¶ 268), *reprinted in* Joint Appendix ("Jt. App.") at 179. The district court also awarded "prejudgment" interest dating from the 1983 liability judgment. *Id.* at 184 (Damages Opinion ¶¶ 294-95). Additionally, the district court permanently enjoined USX from further discrimination, and ordered the company to follow specific administrative and reporting guidelines to insure compliance with the injunction. *Id.* at 188 (Damages Opinion ¶ 317).

II. THE APPEALS

The class appeals from the decision of the district court on three grounds. First, it argues that the district court erred in its determination of liability by failing to find USX liable under the disparate treatment theory. Second, the class argues that the district court erred by failing to award front pay to compensate the class members for the period following the determination of liability and prior to employment by USX, during which the class members continued to suffer from the harm that resulted from USX's discriminatory acts. Finally, the class asserts that the district court erred by denying its request for a damage award that includes prejudgment interest dating from the discriminatory acts to the time of final judgment.

USX cross-appeals from the district court's decision. It argues that the district court erred by applying the disparate impact theory to this case in which a multicomponent hiring system consisting of subjective elements was challenged. USX, together with *amicus curiae* The Equal

Employment Advisory Council ("EEAC"),[8] asserts that application of disparate impact theory is proper only in cases in which a single, objective hiring criteria has been identified by the plaintiff as having an adverse impact upon a protected class. USX and EEAC argue that the use of disparate impact analysis to attack USX's overall system of hiring, without the identification of any particular aspect of that system as discriminatory, placed an unfair burden upon USX that required it to demonstrate the legitimate business necessity of its entire hiring system. Moreover, EEAC argues that the application of disparate impact test to cases such as the present one, for which it is ill-suited, undermines the intention of Congress that disparate treatment analysis be employed in the disposition of these cases.

USX's cross-appeal raises several additional points. It contends that the district court erred by certifying the class, and also by subsequently failing to de-certify the class, pursuant to Fed. R. Civ. P. 27, because the named parties did not adequately represent the class for whom relief was sought. USX further contends that the district court erred by awarding damages to applicants for summer employment for whom no liability award had been entered, and

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[8]The EEAC is a non-profit organization, the membership of which is comprised of employers engaged in various businesses throughout the United States. The self-professed purpose of the organization is "to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices." Brief Amicus Curiae of the Equal Employment Advisory Council in Support of the Appellee/Cross-Appellant at 2. The EEAC has on many occasions prior to this one participated in cases as *amicus* in several federal appellate courts, and in the Supreme Court, advocating the interests of employers on various issues.

by awarding damages for lost social security, pension and other workers' compensation benefits.

Because USX's contentions regarding disparate impact present significant issues of first impression to this Court, we will address them first in this discussion. We will then address the issues raised by the class on the principal appeal, and conclude by discussing the remaining issues raised by USX.

III. DISPARATE IMPACT

USX's contention that disparate impact analysis is inapplicable to cases in which a multicomponent hiring system that utilizes subjective criteria is challenged, brings to this Court for the first time issues that are the subject of a significant conflict between the various Courts of Appeals. *Compare, e.g., Pouncey v. Prudential Ins. Co.*, 668 F.2d 795 (5th Cir. 1982) (use of disparate impact theory in cases involving challenge to multicomponent, subjective criteria hiring system is improper because it unjustly burdens employers); *Watson v. Fort Worth Bank & Trust*, 798 F.2d 791 (5th Cir. 1986) (same), *cert. granted*, ___U.S.___, 107 S.Ct. 3227 (1987), *argued* Jan. 20, 1988, 56 U.S.L.W. 3513 (U.S. Feb. 2, 1988) and *E.E.O.C. v. Federal Reserve Bank*, 698 F.2d 633, 639 (4th Cir. 1983) (challenge that is not directed to " 'specific procedure . . . [that] has a discriminatory impact on blacks' . . . does not fit within the model disparate impact claim") (quoting *Pouncey*, 668 F.2d at 800), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984) with *Antonio v. Wards Cove Parking Co.*, 810 F.2d 1477 (9th Cir. 1987) *(en banc)* (holding that disparate impact analysis may be applied to subjective employment practices in employment discrimination actions); *Griffin v. Carlin*, 755 F.2d

1516 (11th Cir. 1985) (concluding that subjective multicomponent hiring practices are subject to disparate impact analysis) and *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984) (expressly rejecting *Pouncey* and holding that the application of disparate impact analysis to such cases is more consistent with the purposes of Title VII), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985).[9] Although the propriety of applying disparate impact analysis to these cases is often discussed without distinguishing the problems presented by a "multicomponent" challenge from those presented by a "subjective criteria" challenge, the issues are distinct. We have examined the tensions presented by these issues individually and conclude nonetheless that the application of disparate impact analysis to this case is proper.

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[9]This issue has been considered by other courts of appeals as well. *See, e.g.*, Talley v. United States Postal Serv., 720 F.2d 505 (8th Cir. 1983) (deciding that disparate impact theory is inapplicable), *cert. denied*, ___U.S.___, 104 S. Ct. 2155 (1984); Pope v. City of Hickory, 679 F.2d 20 (4th Cir. 1982) (same); cf. AFSCME v. State of Washington, 770 F.2d 1401, 1405 (9th Cir.) (holding that disparate impact analysis is inapplicable to suit challenging hiring practice that based employee compensation on market rates rather than comparable worth, despite demonstrable disparate result, and concluding that that analysis is "confined to cases that challenge specific clearly delineated employment practice at a single point in the job selection process"), *reh'g denied*, 813 F.2d 1034 (9th Cir. 1987); *but see* Rowe v. Cleveland Pneumatic Co., 690 F.2d 88 (6th Cir. 1982) (applying disparate impact analysis to subjective criteria); Clark v. Chrysler Corp., 673 F.2d 921 (7th Cir.) (same), *cert. denied*, 459 U.S. 873 (1982); Williams v. Colorado Springs School Dist., 641 F.2d 835 (10th Cir. 1981) (same).

A. Multicomponent Criteria

In large part, USX's argument on this issue is predicated upon the rationale announced by *Pouncey*.[10] In *Pouncey*, the Court of Appeals for the Fifth Circuit

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[10]As an initial matter, we note that one aspect of the argument that USX advances appears unsupported by the precedent upon which it relies. In *Pouncey*, the Court of Appeals addressed the instance in which a challenge was raised to an employer's whole employment practice, without any component identified as particularly offensive. In the present case, the class has identified one "specific procedure" or "selection criteri[on]," namely the requirement that prospective employees "pass" an interview with P & M foremen, that results in the disparate hiring. USX argues, however, that this identification of a discriminatory procedure is still not sufficiently specific. It asserts that, by failing to identify the specific criteria used by the interviewers that resulted in the discriminatory hiring, the class has not established a sufficient case to trigger disparate impact analysis. *See* Oral Argument Transcript at 33, lines 10-20.

This level of specificity, however, does not appear to us to be what *Pouncey*, or any other authority cited by USX, requires. Moreover, even if USX's argument was an accurate interpretation of those cases, we would reject the analysis as wholly incompatible with *Griggs*. Consistent with that analysis, tests and other such criteria, which the Supreme Court has identified as susceptible to disparate impact analysis, would be exempt from impact scrutiny unless the plaintiff could also identify the particular question or questions that were offensive. This is certainly not the result that the Supreme Court intended in *Griggs* and *Albemarle Paper*, and neither is it a view that we can countenance. Fortunately for USX, however, the arguments that it raises in its principal brief, and those raised on its behalf by the EEAC, do not rest upon this strained level of specificity. These arguments interpret the class's challenge as being to each of the facets of the P & M hiring practice, and it appears that the district court interpreted the challenge in this way as well. *See Green*, 570 F.Supp. at 273 (Conclusions of Law ¶6). Thus, the remainder of this discussion will focus upon the so-called "multicomponent" challenge to the entirety of USX's hiring system. Although USX's reliance upon *Pouncey* in this regard is better placed, the arguments are nonetheless unpersuasive to this Court.

reviewed the district court's denial of an insurance company employee's claim that the overall system of promotion utilized by his employer had the effect of discriminating against him and the class of black employees that he represented. The court held that "the discriminatory impact model of proof . . . [was] not . . . the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." *Pouncey*, 668 F.2d at 800. The court determined that that model applies "only when an employer has instituted a specific procedure, usually a selection criteria [sic] for employment, that can be shown to have a causal connection to a class based imbalance in the work force." *Id.*

USX urges this Court to apply the rationale of *Pouncey* for two reasons: first, it asserts that the class has failed to identify sufficiently one aspect of USX's P & M hiring practice on which to predicate its claim of discrimination. Because the class did not isolate a single criterion of the hiring practice that was discriminatory, USX asserts that it has failed to meet its burden of proving direct causation between some criterion and the disparate result. Second, USX argues that the application of impact theory to this case unfairly deprives it of the ability to assert the defense of "business necessity." That defense was established by the Supreme Court in *Griggs* as an employer's only justifying response to an employee's *prima facie* showing of discrimination under disparate impact analysis. *See* 401 U.S. at 431; *accord Albemarle Paper Co.*, 422 U.S. at 401 (holding that in order for an employer to meet the "business necessity" test, it must prove that the practice is significantly correlated with relevant work behavior.) USX argues that the class's claim effectively challenges the entire range of USX's procedures for hiring

P & M employees and, therefore, that USX must bear the "insurmountable burden" of demonstrating the business necessity of each of the criteria that it uses. *See* Brief for Appellee/Cross-Appellant at 13-14. We do not find any of these arguments persuasive.

USX asks us to disregard the fact that a statistically significant discriminatory result occurred as the result of its hiring practices, and focus only upon the fact that the class is unable to isolate a single offensive component. We cannot conclude that this is a proper balance of the burdens between employees and employers in such cases, or that it is the result contemplated by Congress, or by the Supreme Court in its interpretation of Title VII.

In *Griggs*, the Supreme Court established disparate impact analysis as a means of effectuating Congress's objective in the enactment of Title VII. That objective, the Court noted, "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs*, 401 U.S. at 429-30. The Court determined that pursuant to Title VII, "practices, procedures or tests neutral on their face, and even neutral in terms of intent," could not be maintained if their result was to " 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430. The Court was no more specific in its description of instances to which disparate impact analysis was applicable than by its reference to "practices, procedures, or tests." In our view, however, it is a mistake to construe this language as somehow evincing the Court's intent to circumscribe the use of disparate impact analysis in a manner that leaves a broad range of offensive discriminatory practices unassailable. We can too easily imagine the instance in which an employer, who

without any discernible discriminatory intent, devises a scheme the *aggregate* components of which cause disproportionate hiring. Under the test urged upon this Court by USX, such a scheme would be immune from challenge. As the Court of Appeals for the Eleventh Circuit noted in *Griffin*,

> limiting the disparate impact model to situations in which a single component of the process results in an adverse impact completely exempts the situation in which an adverse impact is cause by the interaction of two or more components.

755 F.2d at 1525 (citing *Gilbert v. City of Little Rock*, 722 F.2d 1390 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984)).

The correctness of our view is supported by the definition given to criteria susceptible to disparate impact analysis set forth in federal regulations promulgated jointly by the EEOC, the Civil Service Commission, the Department of Labor and the Department of Justice. 29 C.F.R. § 1607.1-.17(1987). Those regulations, entitled "Uniform Guidelines on Employee Selection Procedures (1978)," were designed "to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex and national origin." 29 C.F.R. § 1607.1(B). Significantly, these regulations define those procedures that are subject to disparate impact review as

> [a]ny measure, *combination of measures*, or procedure used as a basis for an employment. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and

259 (Findings of Fact ¶ 27). Applications that were not immediately marked as ready were placed into a general application file, and the applicants were categorized according to factors such as race, sex and prior military experience. By this categorization, USX attempted to identify applicants who were in "protected classes" according to EEOC guidelines, for later reference when moving applications from the general file to the ready file. Clerks who maintained the JAL and ready files were instructed to "maintain a good mix" of applicants in the ready file. USX's personnel supervisor testified that he had instructed clerks that 20-30% of those persons ultimately interviewed should be minorities. *Id.* (Findings of Fact ¶ 31).

Hiring was prompted by requests for additional personnel submitted by USX's various department heads. When such a request was made, the personnel clerks selected a number of the applicants from the ready file that they believed would yield the requested number of new employees. These applicants were then invited to interview. The interview process was two-fold. First, the applicant was interviewed by someone from the personnel department, and then by the foreman of the particular department that had requested additional personnel. The department foreman, however, had authority automatically to reject or accept the applicant after the interview. USX policy required that records of these interviews be kept, and that each decision to reject an applicant be accompanied by an explication of the rationale for the decision. These requirements were largely ignored, however, and few records were actually made. *Green,* 570 F.Supp. at 261 (Findings of Fact ¶ 50). Moreover, the interview sheets that were completed for unsuccessful applicants were ultimately destroyed by USX. *Id.* (same).

None of USX's personnel or foremen interviewers were given any formal instruction regarding the evaluation of candidates or the implementation of employment criteria. *Green*, 570 F.Supp. at 260 (Findings of Fact ¶¶ 37, 39). Also, there was no minimum education or work experience requirement for persons hired to do personnel interviews. USX presented evidence that showed that it gave its interviewers only broad guidelines on which to base their determinations. On this point, the district court found that,

> [w]hen making hiring decisions, . . . interviewers evaluated applicants using the following criteria: education; work experience; attitude; initiative; personality; ability to take directions; alertness; intelligence; physical fitness (that is, physical restrictions); ability to communicate; military experience or training; vocational training; ability to meet work schedules; prior criminal record; familiarity with industrial or factory work; interest; prior employment history at Fairless Works; personal references; citizenship or alien status; having a relative in the [USX] work force; and age.

Id. (Findings of Fact ¶ 39).

The district court noted that the majority of these criteria were evaluated in a wholly subjective fashion. Regarding those criteria that were susceptible to objective measurement, "such as education and work experience, [USX] employed no uniform system in assessing one applicant's qualifications vis-a-vis another's." *Green*, 570 F.Supp. at 260 (Findings of Fact ¶ 39). Significantly, at no point did USX ever validate the hiring criteria that it used, nor did it ever ascertain whether those criteria were job-related. The district court found that, "contrary to the

requirements of its own personnel policies, [USX] maintained no system to determine whether its subjective hiring criteria were being fairly and nondiscriminatorily applied to all applicants." *Id.* (Findings of Fact ¶ 44).[6]

B. Evidence Regarding The Disparity

The class argued that the hiring system utilized by USX had a demonstrably adverse impact on black applicants and, further, that USX was aware of this impact and intentionally refused to alter the system to avoid the discrimination that resulted from its use. The class alleged, therefore, that USX was liable to the class under the "disparate impact" theory of discrimination established by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), and *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (*"Teamsters"*), and also under the "disparate treatment" theory as established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

In support of its disparate treatment claim, the class presented statistical evidence of the disparity between whites and blacks in the USX hiring practice that was generated by a study completed by statistics expert, Dr. Samuel Litwin. Using information derived from USX's applicant and employment records, and from the Affirmative Action Quarterly Reports ("AAQR's") filed by USX,

[6]This failure by USX to evaluate critically the hiring policies that it used violated the terms of a consent decree that it had entered as the result of prior litigation. Under this decree, USX was obligated not to use "employee selection criteria 'unless such procedures have been validated in accordance with the Equal Employment Opportunity Commission's "Guidelines on Employee Selection Procedures" (29 C.F.R. § 1607).'" 570 F.Supp. at 260 (Findings of Fact ¶ 42) (citations omitted).

Dr. Litwin determined that, between 1971 and 1982, 49,585 applications for P & M positions were received by USX. Of those applicants, 12,857 (25.9%) were black. *Green,* 570 F.Supp. at 262 (Findings of Fact ¶ 57). This data was analyzed for each year of the class period:

YEAR	TOTAL APPLICATIONS	BLACK APPLICATIONS	%BLACK
1971 (July-Dec)	1,210	280	23.1%
1972	3,953	801	23.1%
1972	5,059	1,222	24.2%
1974	8,985	1,925	21.4%
1975	1,328	267	20.1%
1976	7,022	2,223	31.8%
1977	5,119	1,389	27.1%
1978	10,191	2,969	29.1%
1979	6,665	1,762	26.4%
1980	23	6	26.1%
1981	26	3	26.1%
1982	4	0	0
All Years	49,585	12,875	25.9%

Dr. Litwin's study showed that, during the class period, USX hired 5,516 persons into the P & M Department. Ninety-five percent of these hires were for the unskilled laborer positions at issue in this action. The study also determined that 972 (17.6%) of the persons that USX hired during this period were black.

YEAR	TOTAL HIRES	BLACK HIRES	%BLACK HIRES	%BLACK APPLICANTS
1972 (July-Dec)	609	90	14.8%	20.3%
1973	1,781	287	16.1%	24.2%
1974	1,249	164	13.1%	21.4%
1975	6	2	33.3%	20.1%
1976	253	107	42.3%	31.8%
1977	240	63	26.2%	27.1%
1978	769	147	19.1%	29.1%
1979	582	111	19.1%	26.4%
1980	1	0	0	26.1%
1981	26	1	3.8%	11.5%
1982	0	0	0	0
All Years	5,516	972	17.6%	25.9% (inc. 1971)

Using a standard deviation of 1.64 as the measure of statistical significance, Dr. Litwin evaluated the data regarding USX's hiring practices under four different methods of analysis. By the use of these methods, Dr. Litwin adjusted his analysis to take into account variations that could have affected the accuracy of his conclusions. The first method that he employed ("Method A") compared the ratio of black hires and applicants with the ratio of white hires and applicants. The second ("Method B") computed the expected number of black hires overall in proportion to the number of blacks in the applicant pool. The final two methods ("Method C" and "Method D") examined the timing of applications in relation to the time that hiring decisions were actually made. Each of these methods produced results demonstrating that USX's hiring practice had a statistically significant adverse impact

upon blacks.[7] Under Method A, Dr. Litwin concluded that the shortfall in USX's hiring of blacks ranged between -5 and -11 standard deviations below the expected values. Under Method B the shortfall was more than -14 standard deviations. Under Method C the deviation ranged between -4 and -8, and under Method D the deviation was approximately -6. *Green*, 570 F.Supp. at 263-64 (Findings of Fact ¶¶ 67-74).

C. The District Court's Decision

The district court considered the rebuttal evidence offered by USX and concluded that USX had failed adequately to explain the shortfalls in the hiring of blacks. *Green*, 570 F.Supp. at 272 (Findings of Fact ¶ 132). After making extensive findings of facts, the district court concluded that USX's "hiring practices had a statistically significant disparate and adverse impact on blacks," *id.* (Conclusions of Law ¶ 6), and, therefore, that USX was liable to the class under the disparate impact theory. *Id.* at 275 (Conclusions of Law ¶ 7). The district court concluded, however, that USX had not engaged in intentional discrimination and, accordingly, found in the company's behalf on the disparate treatment claim.

As the result of its conclusions, the district court ordered a second trial to determine the appropriate measure of damages. Following more than two years of discovery, that trial took place in April, 1986. At its conclusion, the district court awarded damages to the class in the

[7]The district court concluded that these results were sufficiently supported by the data and methods that Dr. Litwin employed. Neither that finding, nor the statistical conclusions that Dr. Litwin reached, are challenged on this appeal. A detailed discussion of the analytical methods that Dr. Litwin employed is included in the district court's liability opinion. See *Green*, 570 F.Supp at 263-65.

amount of $ 12,397,928, which represented mitigated back pay and fringe benefits only. *Green v. United States Steel Corp.*, No. 76-3673, mem. op. at 64 (E.D. Pa. Aug. 1, 1986) ("Damages Opinion") (¶ 268), *reprinted in* Joint Appendix ("Jt. App.") at 179. The district court also awarded "prejudgment" interest dating from the 1983 liability judgment. *Id.* at 184 (Damages Opinion ¶¶ 294-95). Additionally, the district court permanently enjoined USX from further discrimination, and ordered the company to follow specific administrative and reporting guidelines to insure compliance with the injunction. *Id.* at 188 (Damages Opinion ¶ 317).

II. THE APPEALS

The class appeals from the decision of the district court on three grounds. First, it argues that the district court erred in its determination of liability by failing to find USX liable under the disparate treatment theory. Second, the class argues that the district court erred by failing to award front pay to compensate the class members for the period following the determination of liability and prior to employment by USX, during which the class members continued to suffer from the harm that resulted from USX's discriminatory acts. Finally, the class asserts that the district court erred by denying its request for a damage award that includes prejudgment interest dating from the discriminatory acts to the time of final judgment.

USX cross-appeals from the district court's decision. It argues that the district court erred by applying the disparate impact theory to this case in which a multicomponent hiring system consisting of subjective elements was challenged. USX, together with *amicus curiae* The Equal

Employment Advisory Council ("EEAC"),[8] asserts that application of disparate impact theory is proper only in cases in which a single, objective hiring criteria has been identified by the plaintiff as having an adverse impact upon a protected class. USX and EEAC argue that the use of disparate impact analysis to attack USX's overall system of hiring, without the identification of any particular aspect of that system as discriminatory, placed an unfair burden upon USX that required it to demonstrate the legitimate business necessity of its entire hiring system. Moreover, EEAC argues that the application of disparate impact test to cases such as the present one, for which it is ill-suited, undermines the intention of Congress that disparate treatment analysis be employed in the disposition of these cases.

USX's cross-appeal raises several additional points. It contends that the district court erred by certifying the class, and also by subsequently failing to de-certify the class, pursuant to Fed. R. Civ. P. 27, because the named parties did not adequately represent the class for whom relief was sought. USX further contends that the district court erred by awarding damages to applicants for summer employment for whom no liability award had been entered, and

[8]The EEAC is a non-profit organization, the membership of which is comprised of employers engaged in various businesses throughout the United States. The self-professed purpose of the organization is "to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices." Brief Amicus Curiae of the Equal Employment Advisory Council in Support of the Appellee/Cross-Appellant at 2. The EEAC has on many occasions prior to this one participated in cases as *amicus* in several federal appellate courts, and in the Supreme Court, advocating the interests of employers on various issues.

by awarding damages for lost social security, pension and other workers' compensation benefits.

Because USX's contentions regarding disparate impact present significant issues of first impression to this Court, we will address them first in this discussion. We will then address the issues raised by the class on the principal appeal, and conclude by discussing the remaining issues raised by USX.

III. DISPARATE IMPACT

USX's contention that disparate impact analysis is inapplicable to cases in which a multicomponent hiring system that utilizes subjective criteria is challenged, brings to this Court for the first time issues that are the subject of a significant conflict between the various Courts of Appeals. *Compare, e.g., Pouncey v. Prudential Ins. Co.*, 668 F.2d 795 (5th Cir. 1982) (use of disparate impact theory in cases involving challenge to multicomponent, subjective criteria hiring system is improper because it unjustly burdens employers); *Watson v. Fort Worth Bank & Trust*, 798 F.2d 791 (5th Cir. 1986) (same), *cert. granted*, ___U.S.___, 107 S.Ct. 3227 (1987), *argued* Jan. 20, 1988, 56 U.S.L.W. 3513 (U.S. Feb. 2, 1988) and *E.E.O.C. v. Federal Reserve Bank*, 698 F.2d 633, 639 (4th Cir. 1983) (challenge that is not directed to " 'specific procedure . . . [that] has a discriminatory impact on blacks' . . . does not fit within the model disparate impact claim") (quoting *Pouncey*, 668 F.2d at 800), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984) with *Antonio v. Wards Cove Parking Co.*, 810 F.2d 1477 (9th Cir. 1987) *(en banc)* (holding that disparate impact analysis may be applied to subjective employment practices in employment discrimination actions); *Griffin v. Carlin*, 755 F.2d

1516 (11th Cir. 1985) (concluding that subjective multicomponent hiring practices are subject to disparate impact analysis) and *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984) (expressly rejecting *Pouncey* and holding that the application of disparate impact analysis to such cases is more consistent with the purposes of Title VII), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985).[9] Although the propriety of applying disparate impact analysis to these cases is often discussed without distinguishing the problems presented by a "multicomponent" challenge from those presented by a "subjective criteria" challenge, the issues are distinct. We have examined the tensions presented by these issues individually and conclude nonetheless that the application of disparate impact analysis to this case is proper.

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[9]This issue has been considered by other courts of appeals as well. *See, e.g.*, Talley v. United States Postal Serv., 720 F.2d 505 (8th Cir. 1983) (deciding that disparate impact theory is inapplicable), *cert. denied*, ___U.S.___, 104 S. Ct. 2155 (1984); Pope v. City of Hickory, 679 F.2d 20 (4th Cir. 1982) (same); cf. AFSCME v. State of Washington, 770 F.2d 1401, 1405 (9th Cir.) (holding that disparate impact analysis is inapplicable to suit challenging hiring practice that based employee compensation on market rates rather than comparable worth, despite demonstrable disparate result, and concluding that that analysis is "confined to cases that challenge specific clearly delineated employment practice at a single point in the job selection process"), *reh'g denied*, 813 F.2d 1034 (9th Cir. 1987); *but see* Rowe v. Cleveland Pneumatic Co., 690 F.2d 88 (6th Cir. 1982) (applying disparate impact analysis to subjective criteria); Clark v. Chrysler Corp., 673 F.2d 921 (7th Cir.) (same), *cert. denied*, 459 U.S. 873 (1982); Williams v. Colorado Springs School Dist., 641 F.2d 835 (10th Cir. 1981) (same).

A. Multicomponent Criteria

In large part, USX's argument on this issue is predicated upon the rationale announced by *Pouncey*.[10] In *Pouncey*, the Court of Appeals for the Fifth Circuit

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[10]As an initial matter, we note that one aspect of the argument that USX advances appears unsupported by the precedent upon which it relies. In *Pouncey*, the Court of Appeals addressed the instance in which a challenge was raised to an employer's whole employment practice, without any component identified as particularly offensive. In the present case, the class has identified one "specific procedure" or "selection criteri[on]," namely the requirement that prospective employees "pass" an interview with P & M foremen, that results in the disparate hiring. USX argues, however, that this identification of a discriminatory procedure is still not sufficiently specific. It asserts that, by failing to identify the specific criteria used by the interviewers that resulted in the discriminatory hiring, the class has not established a sufficient case to trigger disparate impact analysis. *See* Oral Argument Transcript at 33, lines 10-20.

This level of specificity, however, does not appear to us to be what *Pouncey*, or any other authority cited by USX, requires. Moreover, even if USX's argument was an accurate interpretation of those cases, we would reject the analysis as wholly incompatible with *Griggs*. Consistent with that analysis, tests and other such criteria, which the Supreme Court has identified as susceptible to disparate impact analysis, would be exempt from impact scrutiny unless the plaintiff could also identify the particular question or questions that were offensive. This is certainly not the result that the Supreme Court intended in *Griggs* and *Albemarle Paper*, and neither is it a view that we can countenance. Fortunately for USX, however, the arguments that it raises in its principal brief, and those raised on its behalf by the EEAC, do not rest upon this strained level of specificity. These arguments interpret the class's challenge as being to each of the facets of the P & M hiring practice, and it appears that the district court interpreted the challenge in this way as well. *See Green*, 570 F.Supp. at 273 (Conclusions of Law ¶6). Thus, the remainder of this discussion will focus upon the so-called "multicomponent" challenge to the entirety of USX's hiring system. Although USX's reliance upon *Pouncey* in this regard is better placed, the arguments are nonetheless unpersuasive to this Court.

reviewed the district court's denial of an insurance company employee's claim that the overall system of promotion utilized by his employer had the effect of discriminating against him and the class of black employees that he represented. The court held that "the discriminatory impact model of proof . . . [was] not . . . the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." *Pouncey*, 668 F.2d at 800. The court determined that that model applies "only when an employer has instituted a specific procedure, usually a selection criteria [sic] for employment, that can be shown to have a causal connection to a class based imbalance in the work force." *Id.*

USX urges this Court to apply the rationale of *Pouncey* for two reasons: first, it asserts that the class has failed to identify sufficiently one aspect of USX's P & M hiring practice on which to predicate its claim of discrimination. Because the class did not isolate a single criterion of the hiring practice that was discriminatory, USX asserts that it has failed to meet its burden of proving direct causation between some criterion and the disparate result. Second, USX argues that the application of impact theory to this case unfairly deprives it of the ability to assert the defense of "business necessity." That defense was established by the Supreme Court in *Griggs* as an employer's only justifying response to an employee's *prima facie* showing of discrimination under disparate impact analysis. *See* 401 U.S. at 431; *accord Albemarle Paper Co.*, 422 U.S. at 401 (holding that in order for an employer to meet the "business necessity" test, it must prove that the practice is significantly correlated with relevant work behavior.) USX argues that the class's claim effectively challenges the entire range of USX's procedures for hiring

P & M employees and, therefore, that USX must bear the "insurmountable burden" of demonstrating the business necessity of each of the criteria that it uses. *See* Brief for Appellee/Cross-Appellant at 13-14. We do not find any of these arguments persuasive.

USX asks us to disregard the fact that a statistically significant discriminatory result occurred as the result of its hiring practices, and focus only upon the fact that the class is unable to isolate a single offensive component. We cannot conclude that this is a proper balance of the burdens between employees and employers in such cases, or that it is the result contemplated by Congress, or by the Supreme Court in its interpretation of Title VII.

In *Griggs*, the Supreme Court established disparate impact analysis as a means of effectuating Congress's objective in the enactment of Title VII. That objective, the Court noted, "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs*, 401 U.S. at 429-30. The Court determined that pursuant to Title VII, "practices, procedures or tests neutral on their face, and even neutral in terms of intent," could not be maintained if their result was to " 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430. The Court was no more specific in its description of instances to which disparate impact analysis was applicable than by its reference to "practices, procedures, or tests." In our view, however, it is a mistake to construe this language as somehow evincing the Court's intent to circumscribe the use of disparate impact analysis in a manner that leaves a broad range of offensive discriminatory practices unassailable. We can too easily imagine the instance in which an employer, who

without any discernible discriminatory intent, devises a scheme the *aggregate* components of which cause disproportionate hiring. Under the test urged upon this Court by USX, such a scheme would be immune from challenge. As the Court of Appeals for the Eleventh Circuit noted in *Griffin*,

> limiting the disparate impact model to situations in which a single component of the process results in an adverse impact completely exempts the situation in which an adverse impact is cause by the interaction of two or more components.

755 F.2d at 1525 (citing *Gilbert v. City of Little Rock*, 722 F.2d 1390 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984)).

The correctness of our view is supported by the definition given to criteria susceptible to disparate impact analysis set forth in federal regulations promulgated jointly by the EEOC, the Civil Service Commission, the Department of Labor and the Department of Justice. 29 C.F.R. § 1607.1-.17(1987). Those regulations, entitled "Uniform Guidelines on Employee Selection Procedures (1978)," were designed "to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex and national origin." 29 C.F.R. § 1607.1(B). Significantly, these regulations define those procedures that are subject to disparate impact review as

> [a]ny measure, *combination of measures*, or procedure used as a basis for an employment. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and

> physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

29 C.F.R. § 1607.16(Q) (emphases added).

Disparate impact analysis was intended to provide a *means* to an end: eradicating the dilatory effects of racial discrimination in hiring. The analysis is not an end in itself, and should not be scrutinized as such. It was precisely this "excessive preoccupation with the various formulae used in . . . employment discrimination case[s]" that we admonished against in *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 129-30 (3d Cir. 1985), *aff'd on other grounds*, ___U.S.___, 107 S.Ct. 2617 (1987). In that case, we "observed that [these formulae] are simply tools designed to aid in the analysis of evidence. The ultimate question remains whether the defendant has discriminated." 777 F.2d at 130.

Disparate impact analysis is best understood as a burden-shifting device that fairly and reasonably apportions the burdens of proof between parties in a manner that is best suited to achieve the desired goals of Title VII—whether the case presents a challenge to a single criterion or to several. In this case, we are persuaded that the class has sufficiently identified the interview process as one component of the USX hiring system that resulted in the disparate hiring results. We note, however, that the arguments raised in the class's principal brief to this Court indict each of the facets of the USX hiring policy. More significantly, as we noted above, the district court reached its conclusion with the view that the class's challenge was to the entire hiring practice. The district court explicitly rejected USX's argument that impact analysis was improper to challenge a multicomponent hiring system.

Green, 570 F.Supp. at 273 (Conclusions of Law ¶6). It found that the class's challenge to USX's hiring system was sufficient to make a *prima facie* showing of discrimination, and noted that

> [f]urther refinement of [the class's] definition of the hiring selection system [it] attack[s] was made impossible by [USX's] own refusal to be pinned down as to the selection criteria it employs, beyond listing twenty subjective criteria . . . and stating that these criteria were applied as an "amalgam."[11]

Id. at 274 (Conclusions of Law ¶ 6). We hold that on this record, the district court's validation of the class's multicomponent challenge to USX's hiring system under the disparate impact theory of analysis was proper.

The argument against the application of disparate impact analysis to cases in which several aspects of a hiring system are challenged, appears predicated upon an inference drawn from the Supreme Court's holding in *Connecticut v. Teal*, 457 U.S. 440 (1982). In *Teal*, the Court held that an employer could not avoid liability under impact analysis when one of the components in its hiring scheme

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[11]Significantly, the district court found that Dr. Litwin's study demonstrated that the practice of giving priority consideration to applicants who had a relative already employed by USX resulted in an adverse impact against blacks. *Green*, 570 F.Supp. at 265 (Findings of Fact ¶ 81) ("Dr. Litwin . . . found that only 9.7% of successful black applicants had fathers employed at [USX], as opposed to more than 26% of successful white applicants."). This finding extends beyond the challenge to the interview process. As we noted above, the practice of giving priority to applicants with relatives occurred *prior* to the interview, and in fact was the basis for placing these applicants in the ready file, thereby making them eligible to be interviewed. Also significant, the district court found that for the period between 1967 and 1978, immediately preceding and during the class period, USX's workforce was 91.5% non-black. *Id.* (Findings of Fact ¶ 82).

was discriminatory, by demonstrating that its "bottom line" reflected an overall acceptable hiring of blacks. *Id.* at 452. Proponents of the view that disparate impact should not be applied in cases where multiple criteria are challenged argue that a mutuality principle should apply. If the employer cannot advert to the "bottom line" result and use the overall statistics of the system to validate the system notwithstanding the presence of a discriminatory component, then the employee should also be precluded from using "system statistics" to invalidate the entire hiring system without pinpointing a specific component. *See* Brief for Appellee/Cross Appellant at 25-26; *see also* Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits,* 34 Am. U.L. Rev 799, 830 (1985). This argument, however, fundamentally misperceives the rationale of *Teal. Teal* expanded the scope of impact analysis so that it could be used in a greater number of instances in which discrimination was present The Supreme Court noted that Title VII was enacted with the broad intention of removing "'artificial, arbitrary and unnecessary barriers to employment,'" *Teal,* 457 U.S. 447 (quoting *Griggs,* 401 U.S. at 431), and that to meet that goal, the statute sought to address any "*limitations and classifications* that would deprive any individual of employment *opportunities.*" *Id.* at 448 (emphases in original). The Court recognized that in some instances, discriminatory criteria would have an effect that would not be apparent in the "bottom line" number. It instructed, however, that the fact that the discrimination was not evident in the "bottom line" did not satisfy entirely the purpose of Title VII disparate impact analysis. It noted that

> [w]hen an employer uses a nonjob-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant

> adverse effect on minorities or women, then the applicant has been deprived of an employment *opportunity*... In other words [Title VII] ... prohibits discriminatory "artificial arbitrary, and unnecessary barriers to employment..." that "limit... or classify... applicants for employment in any way which would deprive or tend to deprive any individual of employment *opportunities*."

Id. at 448 (quoting *Griggs*, 401 U.S. at 429-31) (emphases in original). Rather than advancing these goals, however, the mutuality theory that USX urges would provide a significant obstacle to their realization. It would require that statistically significant disparate effects that *are* evident in the "bottom line" be ignored until and unless the employee can identify with particularity one offensive component. In too many cases, this view would place upon plaintiffs the onerous burden of sifting through layers of bureaucracy in order to determine precisely the component that results in the discriminatory result. Moreover, it would encourage employers to structure hiring and promotion systems to contain enough subjective criteria to avoid the necessity of responding to complaints of discrimination, or vindicating disparate results. This notion is contrary to *Teal's* expansion of disparate impact analysis to reach those cases in which it is apparent that "arbitrary and unnecessary bariers... limit or classify... applicants... [in ways that] would deprive or tend to deprive... individual[s] of employment opportunities." *Id.* This broad view of disparate impact analysis is consistent with Congress's intent by its enactment of Title VII, and is reflected by the legislative history of the 1972 Amendments to Title VII in which both the House and the Senate explicitly endorsed *Griggs*. That legislative history also reveals that Congress understood that in order to

address adequately those cases involving discrimination that pervades an entire hiring system, an approach that scrutinizes for more than manifest signs of discriminatory intent is necessary. In one Senate Report, the Congress noted that "[e]mployment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of *'systems'* and *'effects'* rather than simply intentional wrongs." *Id.* (quoting S. Rep. No. 415, 92nd Cong., 1st Sess. 5 (1971)) (emphases supplied).

We are unpersuaded by USX's contention that the requirement that it defend a challenge to its hiring practices is unreasonable. Applying disparate impact analysis to this employer's hiring "system" and measuring the disproportionate "effects" on minority hiring that result may impose a difficult burden upon the employer, but not an unfair one. In these cases, the employer has better access and opportunity than the plaintiffs to evaluate critically the interrelationship of the criteria that it uses in its hiring practice, and to determine which aspects actually result in discrimination. This burden is not triggered merely because an employer's hiring practice fails to result in actual hiring that reflects statistically expected percentages of whites and blacks. Rather, it is imposed only in those cases in which the plaintiffs have made a *prima facie* showing that the disparity would not have occurred except for the employer's hiring practices. *Cf. Segar,* 738 F.2d at 1271 ("[a]n employer will face the justificatory burden only after a plaintiff class has shown a disparity in the positions of members of the class and the majority group who appeal to be comparably qualified"). Moreover, the employer retains the opportunity to demonstrate that each of the criteria that it uses are necessary. We are convinced that "[a] rule

placing this justificatory burden on the employer advances the purpose of Title VII far better than would the contrary result." *Id.* We also believe that the imposition of this obligation will not result in an unfair burden upon employers. For these reasons, we sanction the use of disparate impact theory in these cases.

B. Subjective Criteria

Apart from the multifaceted character of its employment practices, USX argues that disparate impact analysis was improperly applied to this case because USX's hiring procedure included subjective criteria, particularly the individual interviews conducted by the foremen. USX asserts that these procedures are not susceptible to impact analysis, but instead are only properly reviewable under disparate treatment theory. We reject this contention.

Although we recognize the reasonableness of an employer's use of subjective criteria to help make hiring or promotion decisions, nothing in the Supreme Court's analysis in *Griggs*, or that we can find in Title VII, suggests that these criteria should be insulated from scrutiny under impact analysis. As we noted above, the objective of impact analysis is to effect Title VII's goal of eliminating "artificial, arbitrary and unnecessary barriers to employment." *Griggs*, 401 U.S. at 431. We are not persuaded that there is a well-reasoned distinction between objective criteria that present barriers to employment opportunities for blacks, and subjective criteria that lead to the same results, that requires us to circumscribe the use of the tool that the Supreme Court has provided to combat such discrimination. In our view, subjective practices such as interviews are just as capable of operating to hinder the employment opportunities of blacks as are tests or other presumptively

objective criteria. *See Griffin,* 755 F.2d at 1525; *Rowe v. General Motors Corp.,* 457 F.2d 348, 359 (5th Cir. 1972). They are also just as likely to be "engendered by a totally benign purpose, or carried on as a matter of routine adherence to past practices whose original purposes are undiscoverable." *Antonio,* 810 F.2d at 1487. For these reasons, we cannot conclude that application of disparate treatment analysis, and its requirement that plaintiffs demonstrate the intent to discriminate, is the only proper method of scrutinizing subjective criteria. Further, we share the fear expressed in *Griffin* that the "[e]xclusion of such subjective practices from the reach of the disparate impact model . . . is likely to encourage employers to use subjective, rather than objective selection criteria." 755 F.2d at 1516. By this method, an employer could use a wide range of criteria during an interview or on a recommendation form without ever articulating these criteria clearly or, more importantly, without validating their necessity to the selection procedure. In our view, "[i]t could not have been the intent of Congress to provide employers with an incentive to use such devices rather than validated objective criteria." *Id.* Moreover, we cannot believe that it was the intent of Congress to allow unarticulated biases or unconscious prejudices to result in discriminatory hiring practices merely because they appear in the form of an unsupervised interview.

For reasons similar to those regarding the applicability of impact analysis to evaluate a multicomponent system, we reject USX's argument that requiring it to defend a challenge to its use of subjective criteria places an undue burden upon it.

> In our view, proving business necessity is no more onerous in a case involving subjective practices than one involving objective practices, because in either case the employer is the person with knowledge of what his [or her] practices are and why he [or she] uses the methods and criteria he [or she] does, as well as the person with superior knowledge of precisely how his [or her] employment practices affect employees.

Antonio, 810 F.2d at 1486. We are persuaded that the district court was correct in its application of impact theory to the challenge that the class raised and, accordingly, we will affirm.

IV. DISPARATE TREATMENT

The district court denied the class's disparate treatment claim because it concluded that the class had failed to demonstrate a *prima facie* case under that theory. *Green*, 570 F.Supp. at 277 (Conclusions of Law, ¶ 8). The district court reached this conclusion because it found that the class had failed to "prove that the defendant intentionally and habitually discriminated against blacks on the basis of their race." *Id.* Although it found that USX was aware that it utilized an employment system that resulted in statistically significant adverse impact upon the hiring of black workers, the district court concluded that the evidence of intent required by Title VII and § 1981 was greater. The district court stated that the fact "'[t]hat an employer was aware of or totally indifferent to the racially discriminatory impact of its hiring policies is not of itself sufficient to establish a *prima facie* case and shift the burden of explanation to the defendant.'" *id.* (Conclusions of Law ¶ 9) (quoting *Gay v. Waiters' & Dairy Lunchmen's Union*, 694 F.2d 531, 552 (9th Cir. 1982)). It held that the class needed to show "an invidious purpose," *id.*, or "a

hostile, discriminatory motive" on USX's part in order to make the *prima facie* showing of disparate treatment. *Id.* at 278. In this analysis of the evidence necessary to establish a *prima facie* case under disparate treatment, however, the district court was in error. [12]

The test that the district court employed placed a much more onerous burden upon the class than the Supreme Court has required for the establishment of a *prima facie* case of disparate treatment. In *McDonnell Douglas,* the Supreme Court set forth four requisites to the *prima facie* showing:

> (i) that a [plaintiff] belongs to a racial minority; (ii) that he [or she] applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his [or her] qualifications, he [or she] was rejected; and (iv) that after his [or her] rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications.

411 U.S. at 802. To be sure, this test was intended as a guidepost for courts in their implementation of disparate treatment analysis, and not as a rigid formula. We are unpersuaded, however, that the test employed by the district court in this case is in any way consistent with the *McDonnell Douglas* parameters. In our view, a showing of

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[12]We note here that our conclusion that the district court's decision was in error is not founded upon the "clearly erroneous" standard of factual review. Rather, we find that the district court misconstrued the appropriate legal standard regarding discriminatory intent in reaching its result. Therefore, our review is of its *legal* and not its *factual* conclusion, and our standard of review is plenary. *See* Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982).

discriminatory intent does not require the explicit demonstration by a plaintiff of an employer's "invidious purpose" or "hostile motive." Rather, to make this showing, "[t]he plaintiff must prove by a preponderance of the evidence that she [or he] applied for an available position for which she [or he] was qualified, but was rejected under circumstances which give rise to an *inference* of unlawful discrimination." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981) (emphasis supplied).

We recognize and adhere to the prior holdings of the Supreme Court and of this Court with regard to the requisite intent that must be demonstrated in order for a plaintiff to prevail in a disparate treatment case, and we do not conclude that the district court erred by its scrutiny of the record for "hostile motive" or "invidious purpose." Our interpretation of the *McDonnell Douglas* and *Burdine* tests, and of the precedent of this Court, however, leads us to the conclusion that the evidence of that intent need not be so direct and uncontrovertible as "smoking gun" evidence to compel a *rebuttal* by the defendant, and to require that that rebuttal be substantive and not mere pretext. In our view, the presence of abundant circumstantial evidence from which the inference of discriminatory treatment can be reasonably drawn is sufficient to require that the employer respond, and that its response be closely scrutinized.

The burden of making the *prima facie* showing in these cases was not intended to be onerous. *See Burdine*, 450 U.S. at 253. The requirement of the *prima facie* showing was intended as a working tool to provide a means to determine which cases raise sufficiently compelling inferences of discrimination to require rebuttal. It was *not* intended as a hallmark of whether the complainant has

proved his or her case. In some cases the inference of unlawful discrimination may be raised, and thus "[a] *prima facie* case of disparate treatment may be established by statistics alone if they are sufficiently compelling." *Griffin*, 755 F.2d at 1525 (citing *Eastland v. TVA*, 704 F.2d 613, 618 (11th Cir.), *opinion modified and reh'g denied*, 714 F.2d 1066 (1983), *cert. denied sub nom. James v. TVA*, 465 U.S. 1066 (1984)). As the Supreme Court stated in *Teamsters*,

> [s]tatistics showing racial or ethnic imbalance are probative . . . [in employment discrimination cases] only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

431 U.S. at 340 n.20; *accord Croker v. Boeing Co.*, 662 F.2d 975, 991 (3d Cir. 1981) (holding that "[w]hen plaintiffs allege classwide racially discriminatory treatment in violation of Title VII, proof of discriminatory motive is essential, although the burden may be met in some situations by presentation of statistical evidence that permits an inference of racial discrimination") (citing *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975)); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 n.14 (3d Cir.) ("disproportionate impact of an employment policy may itself be circumstantial evidence of an intent to discriminate"), *cert. denied*, 464 U.S. 937 (1983). When those statistics are combined with anecdotal evidence further implicating the presence of unlawful

motive in hiring, "the cold numbers [are brought] convincingly to life," *Teamsters*, 431 U.S. at 339, and the plaintiffs *prima facie* case of discriminatory treatment is enhanced.

In the present case, the district court found that there was a significant racial disparity in USX's hiring, of which USX was aware.[13] The district court also found that USX's hiring decisions were predicated upon unguided subjective criteria, that none of the hiring criteria that USX used were ever validated, and that inadequate records were kept by USX to evaluate properly the progress that it was making in its compliance with a consent decree that was the result of previous employment discrimination litigation. We are aware that USX had implemented a scheme by which, it asserts, it attempted to comply with the anti-discrimination laws. That fact, however, without more, does not satisfy the company's obligation to explain the discriminatory results that persisted in its hiring practices. Viewing the statistical disparity in light of the facts that USX's hiring procedure relied so greatly upon the subjective criteria such as the determination of its foremen in interviews, and that the expressed required qualifications for employment are so minimal, we are further convinced that the class

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[13]The district court, relying upon the decision of the Court of Appeals for the Ninth Circuit in *Gay*, determined that the fact that USX was aware of the discriminatory result of its hiring practices is not sufficient evidence of an intent to discriminate. This Court has not expressed a view regarding the propriety of a blanket rule that precludes use of an employer's knowledge as evidence of its intent to discriminate, and we need not reach that question here. In this case, the plaintiffs asserted that the employer was more than merely aware of the discriminatory results of its hiring; they claim that USX fostered them by relying upon non-validated, subjective criteria in its hiring decisions. These facts, together with the significant proportion of the disparity, indicate the presence of intent and, in our view, require a sufficient explanatory response from USX.

succeeded in establishing a *prima facie* case of disparate treatment. [14]

We find the rationale employed in *Parson v. Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374 (5th Cir. 1978), *cert. denied sub nom. Local 13000 United Steel Workers of Am. v. Parson*, 441 U.S. 968 (1979), and *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972), useful to our resolution of the issue before us. In each of these decisions, the appellate court reviewed promotion procedures that resulted in a significant disparity between blacks and whites who sought elevation within a company. The appellate court in *Parson* noted similarity between the promotion procedure challenged in the case under its review, and the procedure that had earlier been invalidated in *Rowe* to the extent that both procedures relied heavily upon non-supervised evaluations by foremen, and utilized "standards [that were] vague and subjective . . . [without] safeguards in the procedure designed to avert discriminatory practices." 575 F.2d at 1385 (citing *Rowe*, 457 F.2d at 358-59). The court noted that "[t]hese factors result in 'procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman.' They are therefore 'a ready mechanism for discrimination against Blacks.' " *Id.* (quoting *Rowe*, 457 F.2d at 359). In light of the statistical disparity between promotions of whites and blacks, and the use of unguided subjective criteria used in the promotion procedure, the

[14]USX is correct in its view that subjective criteria are susceptible to disparate treatment analysis. Our conclusion above that such criteria are also subject to disparate impact analysis does not preclude review under disparate treatment theory. See, *e.g.*, Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc., 690 F.2d 88 (6th Cir. 1981) (subjective evaluation procedure analyzed under both disparate impact and disparate treatment); Bauer v. Bailar, 647 F.2d 1037 (10th Cir. 1981) (same).

appellate court in *Parson* concluded that the district court had erred by failing to employ this standard to determine whether the plaintiff had proved his case of discrimination.

These are precisely the circumstances present in this case. USX's hiring of employees in its P & M Department resulted in a statistically significant disparity between black and white applicants. It based its hiring decisions on unguided, subjective criteria that were never validated as essential to USX's employment practice, or determined to be nondiscriminatorily applied. We find that the presence of these factors is sufficient to raise an inference of unlawful discrimination that requires rebuttal by USX.

Having concluded that the class succeeded in making a *prima facie* showing of discrimination under the disparate treatment theory, we must now determine whether USX articulated a sufficient non-discriminatory reason to rebut the inference that its hiring practice was discriminatory.[15] USX asserts two reasons for its disproportional hiring: (1) that the class members' qualifications were less than those of the applicants ultimately hired; and (2) that a greater proportion of black applicants voluntarily "dropped out" of the hiring process prior to the making of hiring decisions. *See* Brief for Appellee/Cross Appellant at 37-39. Both of these arguments were explicitly rejected by

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[15]Our determination of this substantive issue is proper on this record. The class's allegation of disparate treatment was fully litigated, and therefore USX had a complete opportunity, and an obligation, to present its case refuting the class's allegation. *Cf.* Dreyer v. ARCO Chem. Co., 801 F.2d 651 (3d Cir. 1986) (where district court denies motion to dismiss for failure to demonstrate *prima facie* case, the issue whether plaintiff has made *prima facie* showing is subsumed on appeal into whether the plaintiff has sustained his or her ultimate burden of proving that discrimination occurred), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1348 (1987); Berndt v. Kaiser Aluminum & Chem. Sales, Inc., 789 F.2d 253 (3d Cir. 1986) (same).

the district court. Our review of the record reveals that the district court was correct in concluding that these assertions are wholly without merit, and we find them pretextual.

USX's "best qualified" hiring defense was predicated upon the notion that, although the basic employment requisites were minimal, the company nonetheless made substantive evaluations of the applicants and chose the "best." It asserts in this regard, that the disproportionate hiring merely reflected the fact that white applicants were better qualified. USX asserted specifically that "promotability" was one criterion that it employed to identify the better qualified applicants.

The record is completely devoid of evidence supporting this contention. It reflects only that USX employed a nonspecific amalgam of subjective criteria in reaching its hiring decisions. Significantly, the district court found that

> the process by which [USX] divined who, among its applicants, were the best qualified was wholly subjective, consisting essentially of combining the gut reactions to the applicant of employees in the personnel office and one or more foremen in the plant. *No evidence was presented or offered to show that applicants were tested in any way for ability to do specific tasks required of workers above the laborer level.*

Green, 570 F.Supp. at 269 (Conclusion of Fact ¶ 110) (emphases supplied). Moreover, even the evidence that was presented by USX negated the contention that the company's selection process included any component designed to result in hiring the "best qualified." A study, performed by USX witness Dr. Finis Welch, was introduced to show that USX's hiring reflected differences in applicants' qualifications rather than racial bias. What that

study demonstrated, however, was only that the hiring process was unseemly. Dr. Welch's "Winner/Loser" study revealed what the district court called a "bizarre" pattern of hiring by USX. *Id.* at 270 (Findings of Fact ¶ 119). Among the hiring practices shown by Dr. Welch's study, for example, were that applicants with seven years' experience as manufacturing operatives had no better chance of being hired by USX than did persons with *no* work experience; that an applicant with one year experience as an assembly line worker in an ice cream plant was more likely to be hired by USX than an applicant with 10 years experience as a steel mill laborer; and that applicants with college training or some clerical experience had a *reduced* chance of being hired.

We are aware that no one criterion is significant to every job and that, for some jobs, criteria such as college educations, which are in themselves valuable, are not valuable to the employer in light of his or her employment needs. In the present case, however, USX articulated no logically comprehensible standard that it used to identify applicants who were "better qualified" to do the jobs for which USX was hiring. Moreover, it presented no evidence demonstrating that it evaluated applicants nondiscriminately to determine who those persons were. "Ironically," as the district court noted, the one criterion that Dr. Welch's study did identify as significant was that "being white gave an applicant an 'edge,' that is, an increased possibility of being hired." *Green*, 570 F.Supp. at 270 (Findings of Fact ¶ 119).

USX's second articulated rationale for the disparity in hiring is similarly unpersuasive. Its assertion that a disproportionate share of black applicants voluntarily withdrew from the hiring process is not supported by the evidence of

record. USX relies upon the testimony of Robert Talley, an employee in the company's personnel office who, without any statistical expertise, reviewed hiring data between 1973 and 1974 and concluded that a statistically proportionate share of "job opportunities" was extended to blacks. The district court rejected Talley's conclusions as "unreliable" because of "numerous problems with his data and his methods." *Green*, 570 F.Supp. at 271 (Findings of Fact ¶ 126). The district court heard testimony from Larry Edwards, Talley's supervisor at USX, who testified that "there were no reliable [USX] records from which rates of applicant drop-outs or failures of physical exams could be determined." *Id.* (Findings of Fact ¶ 127). Moreover, Edwards testified that "the phenomenon of 'dropping out' during the interviewing process, or after a job offer had been extended, occurred 'across the board,' and . . . did not occur disproportionately often among blacks." *Id.* In light of this evidence, and of the class's rebuttal of Talley's conclusions because of errant data, the district court concluded that "[USX had] not explained the statistically significant shortfall in black hiring for entry-level P & M jobs, vis-a-vis black representation in the applicant pool, during the class period . . . " *Id.* at 272 (Findings of Fact ¶ 132). We also conclude that this asserted justification for the shortfall in USX hiring is not supported by the evidence of record.

Accordingly, we find each of the reasons relied upon by USX to be pretextual rationalizations for discriminatory hiring. We conclude, therefore, that USX is liable for employment discrimination under the disparate treatment theory of liability, and we will reverse the district court's decision to the contrary.

V. REMAINING ISSUES ON THE CLASS'S APPEAL

The remaining issues raised by the class concern the measure of damages that the district court awarded. Although, as stated above, we will not vacate the entire award based upon our holding that USX was liable to the class under the disparate treatment theory, we find it necessary to vacate part of the district court's decision regarding damages and remand for rehearing. We conclude that the district court erred in the rationale that it employed to deny the class's claims for prejudgment interest and front pay and thereby abused its discretion.

A. Prejudgment Interest

The question of whether to award prejudgment interest in this case is committed to the sound discretion of the district court. The particular rationale that the district court relied upon to deny a full measure of prejudgment damages, however, appears inconsistent with established precedent regarding the award of such relief. In its damage award, the district court expressed the view that the "defendant's lack of *intentional* discrimination is . . . [a] mitigating factor" in its behalf weighing against the award of prejudgment interest that dated back to the acts of discrimination. Jt. App. at 183 (Damages Opinion ¶ 291) (emphasis in original). Therefore, the district court awarded interest from the date of the liability judgment to the damages decision only. Although we defer ordinarily to the discretionary authority of the district courts in such cases, and we recognize that in reaching a determination on such awards, the district court may reasonably consider the extent and determinability of the employer's liability, nothing in the cases suggest that the award of prejudgment

interest should be predicated upon a finding of intentional discrimination or bad faith, or that such an award should be offset by the absence of such bad faith. In fact, the Supreme Court has instructed that the opposite view is more consistent with the purpose in granting remedies for Title VII discrimination.

In *Albemarle Paper Co.*, the Court held that backpay awards could not be conditioned upon the showing of bad faith. The Court noted that Congress had intended that that relief go to the "consequences" of discriminatory employment practices, not simply to the motivation for the discrimination. *Albemarle Paper Co.*, 422 U.S. at 422. The Court stated that if such awards were available

> only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the "make whole" purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in "bad faith."

Id. Although *Albemarle Paper Co.* specifically addressed back pay awards, the Court's primary focus concerned the "make whole" purpose of Title VII damage awards. This purpose is equally applicable to the award of prejudgment interest, and therefore the rationale of *Albemarle Paper Co.* is applicable to this case.[16]

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[16]We will vacate the district court's denial of prejudgment interest because we conclude that the rationale that it applied was erroneous. The decision to award prejudgment interest is committed to the sound discretion of the district court. *E.g.*, Ambromovage v. United Mine Workers of Am., 726 F.2d 972 (3d Cir. 1984). We will therefore remand this question to the district court for its reconsideration in light of this opinion. We note, however, that the purpose of such awards is to ensure that the injured party will be made whole. To fulfill this purpose, prejudgment interest should be "given in response to considerations of

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B. Front Pay

The district court's denial of front pay to the class was predicated upon its view that the amount of such an award would require too much speculation. The speculation that was required resulted from USX's inability to hire the class members at the time that judgment against it was entered, and concerned when USX would be able economically to make *any* new hires for the P & M jobs. The district court found that, "[i]n all likelihood, [USX] will not resume hiring until at least 1990 or 1991." Jt. App. at 180 (Damages Opinion ¶ 274). The class sought an award of the mitigated wages for 1984 and 1985 (the two years immediately succeeding the liability judgment) as an appropriate estimate of front pay. The district court concluded that the "proposed estimate was 'sheer guesswork,' and would require [it] to speculate wildly" as to the proper amount of damages. *Id.* at 181 (Damages Opinion ¶ 277). In this conclusion, however, we find that the district court was in error.

The decision whether to award front pay as relief in Title VII cases rests certainly within the discretion of the trial court. *Dillon v. Coles*, 746 F.2d 998, 1006 (3dCir. 1984). The exercise of that discretion, however, must be sound, and it must be consistent with the rationale and purpose underlying front pay, which, in furtherance of the overall remedy scheme of Title VII, is "to make a victim

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fairness [and] denied when its exaction would be inequitable." Board of Comm'rs of Jackson County v. United States, 308 U.S. 343, 352 (1939); *accord* Brock v. Richardson, 812 F.2d 121, 126 (3d Cir. 1987); *Ambromovage*, 726 F.2d at 982. This Court has construed this language to favor a presumption of the award of prejudgment interest, except where the award would result in "unusual inequities." *Richardson*, 812 F.2d at 127.

of discrimination 'whole' and to restore him [or her] to the economic position he [or she] would have occupied but for the unlawful conduct of his [or her] employer." [17] *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 795 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *cf. Albemarle Paper Co.*, 422 U.S. at 416 (exercise of discretion should not be dictated by the court's " 'inclination, but . . . its judgment; and its judgment is to be guided by sound legal principles' ") (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14, 692d) (Marshall, C.J.)); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 770-71 (1976) (reversing the district court's denial of grant of seniority as remedy for discrimination and stating that "[d]iscretion is vested not for purposes of 'limit[ing] appellate review of trial courts, or . . . invit[ing] inconsistency and caprice,' but rather to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case") (quoting *Albemarle Paper Co.*, 422 U.S. at 421 (brackets in original) (citations omitted)). As we concluded in *Dillon*, the award of this type of relief "necessarily implicates a prediction about the future." 746 F.2d at 1006. The fact that that prediction is difficult should not work to defeat the purpose of the relief.

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[17] We note incident to this discussion that, in our prior decisions regarding a district court's discretion to award front pay, we have reviewed instances where rehiring was possible but impractical because of hostilities between the parties or the nature of the work to be performed. *See* Goss v. Exxon, 747 F.2d 885 (3d Cir. 1984); *Dillon*, 746 F.2d at 998. In cases such as the present, in which rehiring is impossible, the decision to award front pay rests nonetheless within the district court's discretion. In the absence of demonstration by the employer of the plaintiff's failure to mitigate the damages that he or she suffered, however, and where some objective measure of damages exists, such awards are proper and consistent with the "make whole" directive of Title VII and, therefore, should be awarded.

In the present case, it was undisputed that the time at which USX would be economically able to hire new employees was uncertain, although almost assuredly not before seven or eight years following the determination of its liability to the class. In this light, an award to the class of front pay in an amount reflecting mitigated wages for *two* years following the judgment of liability, appears more as a reasonable compromise between the liability for harm caused by USX's discrimination and the class members' ability to mitigate, than "wild speculation." Moreover, to the extent speculation would be inherent in the award, USX and not the class should have borne the risk that the ultimate conclusion would prove in fact erroneous. "The risk of lack of certainty with respect to projections of lost income must be borne by the wrongdoer, not the victim." *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 889 (3d Cir. 1984) (citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931)).

A review of our decision in *Goss* may prove instructive, and elucidate why this case is not one in which the speculation necessary should have precluded the award. In *Goss*, we affirmed the district court's award of front pay. We rejected as requiring insupportable speculation Goss's assertion that she was entitled to a greater measure of front pay. Goss, who had been employed as a salesperson for Exxon Office Systems and whose income there had been based upon commissions from sales, argued that she was entitled to a front pay award that included an amount intended to provide additional compensation to her salary with her new employer. She asserted that she was entitled to this additional measure of compensation because it was unlikely that she would earn as much as a salesperson for the different company as she would have earned at Exxon.

This assertion was apparently predicated upon Goss's belief that, because she had more knowledge of the Exxon product and more experience selling it, her success selling it would be greater than her success selling the new product, and thus her commission salary would have been larger. In its denial of this request, the district court concluded that whether or not Goss would be less successful in her new job than she would have been at Exxon depended in significant part upon future market conditions. The district court thus noted that a difference of sales would not result only from Goss's own skills or anything over which Exxon could exercise control. The district court recognized that not only could it not predetermine whether in fact Goss would be less successful as a salesperson in her new job, but that it also could not predetermine whether her income would not have similarly diminished during the same time period if she had been still employed by Exxon. The court concluded that this type of speculation was unreasonable. It therefore awarded front pay only for that time period following Exxon's liability for back pay and prior to Goss's start in a commensurate position with her new employer.

We affirmed this judgment. The type of speculation that the district court avoided in that case, however, is distinguishable from that required in the present case. Here, the district court was asked to fix some amount that would help to offset future harm that would *certainly* be caused by USX's past discrimination. The class contended that two years' mitigated wages were sufficient and necessary to compensate its members adequately for the injury caused by USX. This amount may in fact be greater (or lesser) than the actual damages to which the class was entitled. It is not our charge to determine whether that

request reflected in fact an appropriate measure. The district court, however, should not have completely refused to award front pay merely because some speculation was necessary. USX should have been presented with the opportunity and the burden to demonstrate that the class members failed in their obligation to mitigate their losses or that for some other reason the award of two years' mitigated wages was unreasonable. USX, however, and not the class, must ultimately bear the risks of speculation. As the Supreme Court has noted, "whatever of uncertainty there may be in this mode of estimating damages, it is an uncertainty caused by the defendant's own wrongful act; and justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced." *Story Parchment Co.*, 282 U.S. at 564 (citations omitted).

VI. REMAINING ISSUES ON USX'S CROSS-APPEAL

Finally, we address the remaining issues raised by USX in its cross-appeal. We find that each of the contentions raised is without merit, and therefore we will affirm the district court's judgment as to those claims.

A. Class Certification

USX argues that the district court erred by certifying the class because the claims raised were not sufficiently typical as required by Fed. R. Civ. P. 23(a).[18] USX asserts

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[18]In pertinent part, Rule 23 identifies

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties
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that, because its personnel who were charged with hiring responsibility based their decisions upon varied subjective criteria, each instance of alleged discrimination was necessarily distinct and, therefore, that the certification of the class was improper.

This contention rests in part upon the same rationale that USX asserts with regard to the applicability of disparate impact analysis to this case—that where subjective criteria are employed, it is necessary to evaluate each instance of discrimination independently. As we noted above, we find nothing in Title VII that requires that result. The argument is similarly unpersuasive in this context. It completely misperceives the typicality requirement of Rule 23. That rule requires that class representatives present sufficiently *common* issues of law and fact upon which the class action is based, to assure that the interests of the absent class members will be adequately represented. As we noted in *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir.), *cert. denied sub nom. Weinstein v. Eisenberg*, 474 U.S. 946 (1985), however, " '[t]ypical' is not identical." Our review under this first requirement of Rule 23 is to assure that the claims presented by the class representatives are consistent with those presented by the entire class. "[T]ypicality entails an inquiry whether 'the named plaintiff's individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.' " *Id.* (quoting *Weiss v.*

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are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23.

York Hospital, 745 F.2d 786, 809 n.36 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985)). We are satisfied that the district court correctly applied this test in its certification of the class, and therefore we will not disturb its judgment.

Similarly, we find that the district court was correct in its decision not to decertify the class. In essence, USX argues that the specific claim presented by the named plaintiff Danley became moot when the class as a whole dropped from its claim allegations of discrimination regarding the particular year in which Danley had made his application to USX. For that reason, USX contends that the district court should have decertified the plaintiff class. This assertion is also incorrect.

The Supreme Court has instructed, in a similar case in which the named representative could not maintain a viable individual claim, that the class can maintain its claims so long as " 'a live controversy [remains] at the time' " the case is reviewed. *Franks*, 424 U.S. at 755 (quoting *Sosna v. Iowa*, 419 U.S. 393, 402 (1975)) (brackets in original). The Court held in *Franks* that, "[a]lthough the named representative no longer had a personal stake in the outcome, . . . '[w]hen the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [the named representative], . . . and, accordingly the 'cases or controversies' requirement of Art. III of the Constitution was satisfied." *Id.* at 753 (quoting *Sosna*, 419 U.S. at 399). These same circumstances are present in this case. Despite the fact that Danley's individual claim was no longer viable, the class retained claims that clearly presented the district court and this Court " 'with a case or controversy in every sense contemplated

by Art. III of the Constitution.' " *Id.* at 755 (quoting *Sosna*, 419 U.S. at 398).

In *Goodman*, we noted that a broad view of Rule 23 in Title VII claims was proper. Thus we found that, although racial bias in the discharges during employee probationary periods was a class claim, and that none of the named representatives were dismissed during their probationary periods, the claims of discharge in employment overall were nonetheless sufficiently common to justify class certification. *See* 777 F.2d at 123. We noted, however, that an expansive view of Rule 23 does not obviate the necessity that each requirement of that rule be met. Accordingly, we found with regard to another aspect of the class's claims, racial discrimination in the initial assignment of new employees, that the named plaintiffs were not sufficiently representative of the class. That finding, however, is distinct from the issue presented in the present case. In *Goodman*, we had determined that the named representatives' claims regarding discrimination in initial assignments fell outside the applicable limitations period. Thus, the question of the sufficiency of the named parties of the class was jurisdictional because their claims were no longer actionable. In this case, the named representative, Danley, did not prevail on his claim because the evidence supporting discrimination during the year in which he was hired was insufficient. That conclusion, however, did not affect the commonality of Danley's claims with the remainder of the class. For this reason, we conclude that it was not an abuse of discretion for the district court to deny the motion for decertification of the class.[19]

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[19]We note further that the relief that we ordered in *Goodman* following our determination that the named parties were in part unable to

(Continued on next page)

B. Summer Hires

Finally, we review USX's contention that the district court erred by its award of damages to applicants for summer employment. USX argues that "[n]owhere in the District Court's liability decision . . . did the Court find as a matter of fact or law that USX unlawfully discriminated against black applicants for summer employment in 1972 and/or 1973." Brief For Appellee/Cross-Appellant at 42. This argument, however, misstates the findings of the district court. We conclude that the district court's opinion clearly included applicants for summer employment in the class to which USX was liable.

In its order dated August 26, 1980 certifying the class, the district court stated that the plaintiff class was comprised of "[a]ll black persons who unsuccessfully sought employment at the Fairless Hills, Pennsylvania Plant of [USX] between July (11) (sic), 1972, and the [date of this order]." *Green*, 570 F.Supp. at 256. That order was never amended to exclude summer applicants from the plaintiff class, and there is no indication that the district court contemplated that this sub-class was to be severed from the overall class. To the contrary, in several instances in its opinion, the district court made particular reference to the summer applicants. *See id.* at 257 (Findings of Fact ¶ 16) ("[a]pproximately 15% of new P & M hires during the class

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(Continued)
represent the claims of the entire class, was not that the class automatically should be decertified. Rather, in consideration of the considerable judicial resources that had been expended in adjudicating the claims, we vacated the findings regarding the non-represented claims and remanded with instructions that the district court "explore the possibility of intervention by qualified class representatives, followed by a proceeding to determine if the findings previously reached may be reinstated." *Goodman*, 777 F.2d at 124.

period were hired for summer jobs"); *Id.* at 271 (Findings of Fact ¶ 128) (questioning the statistical evidence presented by USX's expert, and noting that part of the reason for the doubt was that the expert's data did "not include applications submitted by persons seeking summer jobs, *although they are members of the class*") (emphases supplied). We are convinced by these references, and by our review of the record, that the district court made findings of fact regarding the summer hires that justified inclusion of this sub-class in the damage award. In this light, USX's challenge regarding the summer applicants is more appropriately characterized as an assertion that the record does not support the *liability* determination that the district court made. On this question, our standard of review is whether the court's findings were clearly erroneous, *see Pullman*, 473 U.S. 273, and our conclusion is that they were not.

In our review of the propriety of the factual findings of the district court, we need only determine whether the decision that it reached was reasonable—not whether a different conclusion would also have been reasonable. Before we may properly intrude upon any factual finding that the district court made, we must be "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). In this case, we are not in this way convinced of any error by the district court.

Although much of the data regarding summer hires for the years in queston was unavailable, we note that the reason for that unavailability was USX's destruction of all of the applications for employment prior to 1975. See

Green, 570 F.Supp. at 261 (Findings of Fact ¶ 49). Notwithstanding this fact, the class's statistical expert, Dr. Litwin, was able to present findings to the district court that "[USX's] hiring had a statistically significant negative and disparate impact upon blacks *auring the overall class period[,] . . . [and this conclusion was] the same whether summer hires were included or excluded.*" *Id.* at 265 (Findings of Fact ¶ 83) (emphasis supplied).

In our view, the inferences that the district court drew from these facts were reasonable. We are not left with the certain impression that the district court's findings that the summer hires should be included in the overall class for the purpose of determining liability were clearly erroneous. Therefore, we will affirm this aspect of the district court's judgment.

VII. CONCLUSION

For the foregoing reasons, we will affirm the judgment of the district court as to its holding of liability of USX to the class under the disparate impact theory of discrimination. We will also affirm that part of the judgment in which the district court ruled that class certification was proper, and that summer applicants were properly included in the class to whom liability is owed. We will reverse the judgment of the district court to the extent that it did not also find that USX was liable to the class under the disparate treatment theory of discrimination.

In accordance with this holding, and in light of our additional conclusions that the district court erred in the rationale that it employed in its denial of prejudgment interest and front pay to the class, we will affirm the damage award in part, vacate that award in part and remand

for rehearing, consistent with this decision, of these issues of damages.

ROSENN, *Circuit Judge*, Concurring and Dissenting.

I join in the majority opinion except with respect to the issue of front pay (Parts V.B and VII).

I respectfully dissent from the majority's conclusion that the district court abused its discretion in denying the class front pay. Initially, the district court observed that the economic status of defendant's industry would, in all likelihood, preclude it from hiring again until 1991. The court proceeded to reject the class' request for two years mitigated front pay, asserting that plaintiffs had simply failed to introduce sufficient evidence to support their award. It concluded that plaintiffs' estimate is "sheer guesswork and would require this court to speculate wildly."

Relying upon our decisions in *Maxfield v. Sinclair Int'l*, 766 F.2d 788 (3d Cir. 1985), and *Goss v. Exxon Office Systems Co.*, 747 F.2d 885 (3d Cir. 1984), the majority holds that the district court's decision constituted an abuse of discretion. Observing that front pay awards inevitably implicate predictions about the future, and that a wrongdoing defendant should bear the risk of uncertainty, the majority concludes that the district court should have awarded the class "mitigated wages for two years following the judgment of liability." I disagree.

Front pay represents another of the "make-whole" remedies available to redress the effects of past discrimination. An award of front pay compensates an injured party for the period required to reestablish his or her rightful place in the job market. *Goss*, 747 F.2d at 885. Typically, courts resort to awards of future lost earnings only when

the traditional equitable remedy of reinstatement is unavailable. *Maxfield*, 766 F.2d at 796. Some of the factors which district courts have employed to alleviate the speculative nature of future damage awards include: an employee's duty to mitigate, the availability of employment opportunities, the period within which one by reasonable efforts may be reemployed, the employee's work and life expectancy, discount tables determining the present value of future damages, and other factors that are pertinent to prospective damage awards. *Koyen v. Consolidated Edison Co.*, 560 F.Supp. 1161, 1168-69 (S.D.N.Y. 1983). As the majority appropriately notes, the decision to award front pay rests in the sound discretion of the trial court. *Dillon v. Coles*, 746 F.2d 998, 1006 (3d Cir. 1984).

Where a district court has articulated a sound and principled justification for either awarding or denying front pay, we have repeatedly affirmed its decision. *See Goss*, 747 F.2d at 890; *Maxfield*, 766 F.2d at 796; *Dillon*, 746 F.2d at 1006; and *Berndt v. Kaiser Aluminum and Chemical Sales, Inc.*, 789 F.2d 253, 261 (3d Cir. 1986). In the present case, the district court, in the sound exercise of its discretion, evaluated the dearth of evidence introduced by the class in support of its front pay request, and concluded that such an award was unwarranted. The majority points to no error in the district court's consideration of the relevant evidence, but concludes merely that "an award reflecting mitigated wages for two years . . . appears . . . a reasonable compromise." In my view, the majority is simply substituting its judgment for that of the district court. I do not believe that the majority's holding is consistent with the abuse of discretion standard.

Moreover, the majority's observation that front pay awards are inevitably speculative cannot be employed to circumscribe the exercise of a district court's discretion. Courts have commented upon the speculative nature of front pay awards mainly to counter arguments in favor of their *per se* exclusion. *See Koyen*, 560 F. Sup. at 1168. Recognizing the inherent uncertainty of future damage awards, this court has nonetheless affirmed holdings which have denied them. *See Goss*, 747 F.2d at 890.

Accordingly, I would affirm the judgment of the district court with respect to front pay.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

ELBERT G. GREEN, Individually and Robert Danley, Individually and as the Representative of Persons Similarly Situated

V.

UNITED STATES STEEL CORPORATION

Civ. A. No. 76-3673.

United States District Court, E.D. Pennsylvania

July 18, 1983.

MEMORANDUM

NEWCOMER, District Judge.

This employment discrimination class action was tried to the Court in December, 1982. The following shall constitute my Findings of Fact and Conclusions of Law.

Findings of Fact

1. This is a Title VII and § 1981 class action brought on behalf of all black persons who unsuccessfully sought employment at the Fairless Hills, Pennsylvania plant of United States Steel Corporation ("USS") between July 11, 1972 and the present. The class described above was certified by Order dated August 26, 1980.

2. The defendant, USS, is a corporation doing business in the Commonwealth of Pennsylvania, in many other states, and in foreign countries. Throughout the class period, USS owned and operated steel manufacturing and other facilities located in Fairless Hills, Pennsylvania and employed from 7,000 to 10,000 persons there. USS is an

"employer" within the meaning of Title VII. (Unless otherwise specified, references hereinafter to USS shall be understood to refer specifically to the Fairless Hills facilities of USS.)

3. Named plaintiff Elbert Green is a black male who unsuccessfully sought employment as a laborer in USS's Production & Maintenance department ("P & M") by application dated April 11, 1973. On May 7, 1973, Green filed with the Equal Employment Opportunity Commission ("EEOC") a timely charge of race discrimination in employment against USS, and subsequently he received a notice of his right to sue in federal court.

4. Green was an unnamed member of the plaintiff class of unsuccessful black job applicants at USS in *Dickerson v. United States Steel Corp.*, C.A. No. 73-1292, a Title VII and § 1981 race discrimination suit.

5. On November 29, 1976, following the severance of the applicant class from the *Dickerson* lawsuit, Green filed this action on his own behalf and on behalf of the applicant class.

6. Named plaintiff Robert Danley is a black male who unsuccessfully sought a P & M job by application dated June 4, 1976.

7. Danley was also initially an unnamed class member in *Dickerson*. Following his receipt of notice of the severance of the applicant class from that action, Danley filed with the EEOC a timely charge of race discrimination in employment against USS and received a notice of his right to sue in federal court.

8. When Green filed this action on behalf of the applicant class, Danley became an unnamed class member. On

January 10, 1979, Danley filed a motion to intervene as a named plaintiff. Prior to a ruling by the Court, the parties stipulated that Danley could serve as Green's co-representative of the applicant class.

9. By a Memorandum and Order dated August 29, 1979, I entered partial summary judgment in favor of USS on Green's individual claim. Discovery had established that Green had falsified his employment history on his job application. I held that this evidence satisfied USS's burden of articulating a legitimate, nondiscriminatory reason for its failure to hire Green. I reserved for trial the questions whether plaintiff was qualified for the job for which he applied; whether USS was hiring anyone for those jobs at the time he applied; whether it was hiring for those jobs immediately after his rejection; and whether, if plaintiff could establish a prima facie case, plaintiff could establish that USS's articulated reason for rejecting him was a standard applied equally to all races or was, rather, a mere pretext for racial discrimination.

10. In my August 26, 1980 class certification order, I ruled that Green could not serve as a class representative because his claim, presenting the narrow and atypical issue whether USS had uniformly and nondiscriminatorily rejected applicants who falsified their job applications, was not appropriate for class treatment. Danley thus became the sole class representative, and Green remained a named plaintiff on his individual claim only.

11. At trial, plaintiffs presented no evidence relevant to Green's individual claim.

12. On the first day of trial, plaintiffs narrowed their case to include only those blacks who unsuccessfully sought employment in P & M jobs during the class period.

Plaintiffs also indicated that they were not pressing their case as to the years 1975, 1980, and 1981, when very little hiring was done for P & M jobs at Fairless Hills, or as to the years 1976 and 1977, when plaintiff's evidence showed that a moderate amount of hiring was done but that blacks were hired at levels close to or exceeding their representation in the applicant pool. Plaintiff's case therefore focussed on the question whether USS unlawfully discriminated against black P & M applicants at Fairless Hills in the years 1972-74, 1978, and 1979.

13. Plaintiff Danley did not testify at trial, and plaintiffs presented no proof directly relating to him as an individual, other than his application for employment and a stipulation relating to his satisfaction of the jurisdictional prerequisites. His application date of June, 1976 places him among those class members who applied to USS at a time when plaintiff's statistical evidence shows that USS was hiring blacks at rates equalling or exceeding their representation in the applicant pool.

14. Plaintiffs presented the testimony of two unnamed class members, Christine Davidson and Frederick Wright. Ms. Davidson, a black woman, submitted an application for a P & M job on August 24, 1976. She had a GED degree, vocational training, and a record of steady employment. Mr. Wright, a black man, submitted an application for a P & M job on June 8, 1977. He had several years of college education, prior work experience as a laborer, and a record of steady employment before, during, and after college. Although both Ms. Davidson and Mr. Wright possessed the qualifications necessary to be considered for employment in an entry-level P & M job, neither was hired by USS. Thereafter, USS continued to hire persons for entry-level P & M jobs.

15. The P & M job category is the largest at USS. Approximately 95% of new hires (that is, people hired from outside the company rather than promoted or transferred from within) in P & M during the class period were hired for the position of laborer, an entry-level unskilled job. About 4% of new hires were for skilled jobs in the trade and craft category, although USS usually filled these positions through its internal apprenticeship programs. P & M jobs other than those in the laborer or trade and craft categories were customarily filled from within the plant, by a posting and bidding system, although in rare instances individuals were hired from outside to fill such jobs.

16. Approximately 15% of new P & M hires during the class period were hired for summer jobs. Virtually all of these jobs were in the laborer category.

17. USS's minimum hiring criteria for all P & M positions remained constant throughout the class period. Anyone hired had to be at least 18 years old, pass a physical examination, and be able to read safety signs (a requirement so minimal that defendant's witnesses could recall no one ever having failed to meet it). Additional minimum requirements applied to those seeking skilled trade and craft jobs. However, as long as an applicant met the three minimum requirements described above, there was no single quality or trait which would make an applicant ineligible *per se* for a laborer job. *Cf.* P-55 [1] (USS policy restricting employment of relatives within a single supervisory unit); P-56 (USS policy stating that USS would "usually" not consider applicants who had been convicted of arson,

[1]Many of the documents which will be referred to by "P" exhibit numbers were also defense exhibits.

malicious destruction of property, or acts of sexual perversion); P-57 (USS policy stating that alien applicants should be required to produce appropriate documentation).

18. In its newspaper advertisements for laborers, USS stated that there was "no experience necessary," and that USS required only "common sense and a desire to work" (P-114). In fact, many of those hired into P & M laborer jobs during the class period had no prior work experience. USS expected new hires for P & M jobs other than those in the trade and craft category to learn any skills necessary to perform their jobs, or other jobs they might be promoted into, through on-the-job training or classroom instruction provided by USS.

19. Throughout the class period, USS's official policies relative to hiring new employees were set forth in the following documents: Exhibits P-43, P-53, P-54, P-55, P-56, P-57, P-58, P-59, and P-64. Exhibit P-43, entitled Procedure for Uniform Employment Practices, set forth USS's official policy of nondiscriminatory hiring of the best qualified candidates.

20. USS did not conduct any training sessions to indoctrinate the many individuals responsible for implementing its hiring policies as to their meaning and application.

21. During the class period, USS received written employment applications on a variety of different forms, all of which requested the applicant to list basic background information concerning schooling, prior employment, military record, age, physical condition, and whether the applicant had any relatives in USS's current or past work force. Such applications were received by mail or hand-delivery, or might be filled out in USS's personnel

office by individuals who stopped by to inquire about employment. USS accepted new applications from persons who had previously applied but had not been hired.

22. Upon receiving a job application, USS's practice was to record it in a business record called the Job Applicant Log ("JAL"). The following information was entered in the JAL from each application: date of application; name of applicant; EEOC code (indicating race and sex); job applied for; and comments.

23. Separate JALs were prepared for summer applicants for 1972, 1973, and 1974, the only years during the class period in which USS made summer hires.

24. Larry Edwards, who was USS's Supervisor of Employment until 1975 and General Supervisor of Personnel thereafter, and Mabel Williams, who became Supervisor of Employment when Edwards was promoted in 1975, both instructed personnel office employees repeatedly to maintain the JALs as promptly and accurately as possible.

25. On occasion, a backlog of one or more weeks developed in the entry of application information into the JAL. All such information was, however, ultimately entered into the JALs. Any errors in, or omissions from, the JALs were due merely to normal clerical mistakes. From their personal experience with the JALs, Mr. Edwards and Mrs. Williams believed that no errors or omissions in the JALs occurred in a racially disproportionate manner. That is, they understood that blacks were included in the JALs with the same frequency as non-blacks.

26. In interrogatory answers, USS stated under oath that information concerning applicant flow should be obtained from the JALs (USS's Response to Interrogatory

4 of Plaintiffs' Third Set of Interrogatories). At trial, Mr. Edwards testified that all existing information on applicant flow at USS during the class period is in the JALs. During the class period USS used applicant flow data from the JALs to defend against 43 EEOC charges of race discrimination in hiring. USS also used applicant flow data derived from its JALs to prepare its Affirmative Action Quarterly Reports (AAQRS), which it filed with the United States government pursuant to certain consent decrees entered into in the course of prior litigation.

27. Mr. Edwards and Mrs. Williams reviewed newly submitted applications from time to time and would occasionally single one out for special consideration. One reason why an application might receive special consideration would be that the applicant had a relative employed at USS. Such applications were moved ahead of other applications and placed immediately in the "ready" file—that is, the file of processed applications which had been cleared as worthy of consideration and which were ripe for the scheduling of an interview.

28. The "comments" section of the JALs contain occasional entries indicating that Edwards had given the applicant special consideration.

29. Those applications which were not placed immediately into the "ready" file were placed into general application files which were segregated according to the EEOC category and job preference of the applicant. An inexact system of prioritizing was employed with respect to applicants who fell into more than one category. For instance, a black male veteran's application might be filed in the "black males" category of the "veterans" category or might be duplicated and filed in both. USS also often duplicated and cross-filed applications of individuals who applied for

more than one type of job, for example, Production & Maintenance or Clerical & Technical.

30. Prior to about 1977, USS followed a general policy of considering for employment persons whose applications had been submitted to USS within the previous twelve months. Therefore, the general application files were reviewed periodically to remove those applications which were more than a year old. In about 1977, USS adopted a policy in which applications were supposed to be considered for employment for only 120 days, unless renewed by the applicant by a telephone call or visit to the plant. That 120-day policy was not consistently followed, however. Even after 1977, applications were considered for hiring purposes beyond the 120-day period, and they were kept in the general application file for one year.

31. USS personnel clerks and interviewers, with the supervision of Mr. Edwards and Mrs. Williams, were responsible for pulling applications from the general applications files and placing them in the "ready" file. The clerks were instructed to maintain a "good mix" of applications in the "ready" file—that is, the "ready" file was to contain representative applications from each of the EEOC categories so that those called in for interviews would be a racially balanced group. Mr. Edwards testified that he instructed the personnel department employees to see that 20-30% of those interviewed were minorities.

32. USS hired applicants in response to personnel requisitions submitted to the personnel department by the various operating departments. Upon receiving a personnel requisition, USS's personnel clerks or interviewers would select the approximate number of applications from the "ready" file which experience told them was necessary

to yield the desired number of hires. These applicants were then contacted and invited to schedule interviews.

33. USS personnel department employees compiled a business record called the Daily Call-In List reflecting the names of applicants scheduled for interviews and the dates of their interviews. After 1974, the Daily Call-In List included a notation of the race of each applicant interviewed.

34. Some applicants scheduled for interviews did not report for the interview and were eliminated from consideration. A record was kept reflecting which applicants did not report for interviews.

35. When an applicant showed up for a scheduled interview, his or her preliminary interview was conducted by a USS personnel department interviewer. The applicant was then interviewed by the foreman or general foreman of the operating department which had requisitioned employees. The foreman or general foreman had the authority to reject the applicant, or to accept him or her, subject to the applicant's successfully completing a physical examination. When a foreman or general foreman turned an applicant down, Mr. Edwards or Mrs. Williams would sometimes review the reasons for the rejection and possibly refer the same applicant to another operating department which needed new employees for another interview.

36. Over the class period, between 50 and 100 USS foremen or general foremen and some 12-15 USS personnel department interviewers interviewed applicants for work at USS. During that period, for example, one foreman conducted some 600 interviews.

37. Although the USS Procedure for Uniform Employment Practices required all interviewers to be

trained, USS did not train its interviewers other than through on-the-job exposure to other interviewers' techniques. Nor did USS have any minimum education or work experience requirements for persons hired as interviewers.

38. Despite the requirements in the Procedure for Uniform Employment Practices that "an investigation is to be made of each individual being considered for employment" (P-43, ¶ I), USS made no such investigations.

39. When making hiring decisions, USS's evidence was that its interviewers evaluated applicants using the following hiring criteria: education; work experience; attitude; initiative; personality; ability to take directions; alertness; intelligence; physical fitness (that is, physical restrictions); ability to communicate; military experience or training; vocational training; ability to meet work schedules; prior criminal record; familiarity with industrial or factory work; interest; prior employment history at Fairless Works; personal references; citizenship or alien status; having a relative in the USS work force; and age. Most of these criteria are wholly subjective. As to those criteria which can be objectively measured, such as education and work experience, USS employed no uniform system in assessing one applicant's qualifications vis-a-vis another's. Nor were the various interviewers and foremen trained in any way as to what the different criteria meant or how to implement them uniformly, although many of them are vague and all are subject to differing interpretations.

40. USS took no steps to validate its hiring criteria or to ascertain whether they were job-related.

41. USS's own Procedure for Uniform Employment Practices cautioned against testing applicants for "mental alertness and general ability" unless those factors were demonstrated to be work-related. (P-43, ¶ H.3.)

42. Under consent decrees entered into in the course of prior litigation, USS was bound not to use employee selection criteria "unless such procedures have been validated in accordance with the Equal Employment Opportunity Commission's 'Guidelines on Employee Selection Procedures' (29 C.F.R. § 1607)." (P-112, pp. 431:139 and 431:151.) USS made no attempt to validate its employee selection criteria in accordance with EEOC regulations.

43. USS's Procedure for Uniform Employment Practices requires written documentation of the reasons why any applicant is rejected. (P-43, ¶¶ D.8, G.3, J.3.) The policy requires such documentation "to substantiate conformity with the code of nondiscriminatory treatment . . . of applicants," (P-43, ¶ D.3), to provide "a later justification of selection should it be questioned," (P-43, ¶ G.4), and to serve as "check points to insure that the processing described in (P-43) is completed for all new employees" (P-43, ¶ J.3.a). Despite the Procedure's requirement for documenting the reasons an applicant was not hired, USS only unevenly and imperfectly recorded those reasons. Nor did USS's personnel department regularly review the reasons for rejection that were occasionally recorded. Finally, most of those documents which did contain interview comments were destroyed by USS.

44. Contrary to the requirements of its own personnel policies, USS maintained no system to determine whether its subjective hiring criteria were being fairly and nondiscriminatorily applied to all applicants.

45. Applicants who successfully completed the interview procedure were extended job offers conditional upon passing a physical examination.

46. Besides those applicants who were scheduled but did not report for interviews, some applicants voluntarily withdrew at some stage of the interview/physical-examination process. Others would decline job offers when they were made, or would accept offers but fail to report for work when scheduled.

47. When an individual was hired and reported for work, he or she would be recorded in a business record called the Daily Employment Report (DER). Those who failed to report as scheduled would be logged in with notation "DNS" (for "did not start"). The DER recorded the following information about those hired: pay number; name; starting date; employee status; department; race code; remarks; supervisor; and social security number.

48. USS prepared AAQRs for P & M applicants and hires for the periods January 1, 1972—December 31, 1973 and July 1, 1974—April 30, 1982. The JALs and DERs were key data sources for these reports, which USS filed with the United States Government.

49. USS destroyed thousands of job applications submitted during the portion of the class period prior to 1975, although EEOC regulations require the maintenance, during the pendency of a charge of discrimination, of application forms completed by the unsuccessful applicant and by all other candidates for the same position for which the aggrieved person applied and was rejected. Prior to some point early in 1975, applications which did not result in

employment were not retained. USS retained most applications filed thereafter, although some were lost due to clerical error.

50. USS interviewers sometimes used interview sheets to take notes of information gathered during applicant interviews. USS preserved certain interview sheets for successful applicants during the class period, but destroyed all interview sheets for unsuccessful applicants.

51. During the class period, USS conceived of its obligation not to discriminate against racial minorities in hiring as an obligation to hire minorities in proportion to their representation in the work force in Bucks (Pennsylvania), Burlington (New Jersey) and Mercer (New Jersey) Counties. USS's corporate headquarters approved the practice of setting minority hiring goals by reference to the percentage of minorities believed to be in the geographically defined labor market. Over the class period, USS's goals for minority hiring, derived from labor market data relating to the three-county area, varied between 9.5% and 11.5%.

52. USS's personnel department employees reviewed the DER periodically to see what percentage of minorities was being hired. When USS wanted to change the percentage of minorities hired, it would simply change the percentage of minorities scheduled for interviews. For example, Mr. Edwards testified that in 1976, when USS was defending against many charges of race discrimination, and when it was under pressure to increase the number of blacks in its apprenticeship programs in order to meet its obligations under the consent decrees referred to earlier, USS consciously increased the percentage of minorities scheduled for interviews in order to achieve a higher percentage of black hires. It was necessary to increase the

number of black laborers in order to increase black representation in the apprenticeship programs because the latter were stocked from the ranks of laborers and other P & M workers. USS in fact achieved a dramatic increase in its percentage of black hires in 1976, as was shown by the statistical evidence discussed below. Mr. Edwards admitted that the increase in black hires in 1976 was not due to USS's receipt of applications from blacks with better qualifications.

53. In setting its hiring goals for minorities, USS paid no attention to the percentage of minorities in the applicant pool.

54. In support of their claim, plaintiffs presented the testimony of a statistical expert, Dr. Samuel Litwin, who analyzed USS's hiring practices. Dr. Litwin's report was plaintiffs' Exhibit 122. Dr. Litwin's studies addressed the question whether the hiring practices and policies of USS during the class period had a statistically significant disparate and unfavorable impact on black applicants.

55. Dr. Litwin's studies were based on the most accurate USS data available. Dr. Litwin received data derived from USS's JALs and DERs in computer-readable form. He and those working under him then verified the accuracy of the data supplied by USS, line-for-line, against the actual JALs and DERs. Where the JALs and DERs did not provide complete information because records had been destroyed, Dr. Litwin used data derived from USS's Affirmative Action Quarterly Reports ("AAQRs") and a document prepared by USS Employee Relations staff assistant Kevin Goodwin in 1978 ("the Goodwin Report"). Finally, Dr. Litwin obtained random samplings of actual job applications from the years after February, 1975 (prior applications having been destroyed), the Daily Call-In

Logs, and the "DNS-DNR" file, which listed those applicants who either did not report for a scheduled job interview or did not start work as scheduled after accepting a job offer. These sources were used to supplement and check the reliability of data obtained from the JALs, DERs, AAQRs, and the Goodwin Report.

56. Dr. Litwin included in his studies a correction factor to correct for clerical errors in recording the race code of applicants.

57. Using available USS employment records, plaintiffs established that 49,585 applications for P & M positions were submitted to USS in the period from July 11, 1971 through 1982. Of this total, 12,857 P & M applications, or 25.9%, were submitted by blacks. Information about applications submitted during the years 1973 through 1982 was obtained directly from the JALs prepared by USS. USS destroyed the JAL for 1972. Information about applications submitted during 1972 was therefore obtained from the 1972 AAQRs, which USS prepared from the 1972 JAL and DER for submission to the U.S. Government. Because USS considered applications to be eligible for employment for one year and because the class period for hiring begins on July 11, 1972, the appropriate applicant pool in this case commences with applications filed after July 11, 1971. Information about applications submitted during the last half of 1971 was obtained from the Goodwin Report, a group of documents USS prepared in 1978 from the JALs and other USS records for submission to the EEOC in defense of 43 charges of race discrimination. The Goodwin Report states the number of P & M applications submitted to USS in 1971.

58. The applications data plaintiffs developed from USS business records show by year, the following number of applications (total and black) submitted for P & M positions:

YEAR	TOTAL APPLICATIONS	BLACK APPLICATIONS	%BLACK
1971 (July-Dec.)	1,210	280	23.1%
1972	3,953	801	20.3%
1973	5,059	1,222	24.2%
1974	8,985	1,925	21.4%
1975	1,328	267	20.1%
1976	7,022	2,233	31.8%
1977	5,119	1,389	27.1%
1978	10,191	2,969	29.1%
1979	6,665	1,762	26.4%
1980	23	6	26.1%
1981	26	3	26.1%
1982	4	0	0
All Years	49,585	12,875	25.9%

59. Dr. Litwin's data show that, during the class period, USS hired 5,516 persons for P & M positions at its Fairless Works. Of these 5,516 P & M hires, 972—or 17.6%—were black. These figures were obtained directly from the DERs, contemporaneously prepared corporate records of USS hiring activity.

60. The DERs show the number of P & M hires (total and black) at USS for each year in the class period:

YEAR	TOTAL HIRES	BLACK HIRES	%BLACK HIRES	%BLACK APPLICANTS
1972 (July-Dec.)	609	90	14.8%	20.3%
1973	1,781	287	16.1%	24.2%
1974	1,249	164	13.1%	21.4%
1975	6	2	33.3%	20.1%
1976	253	107	42.3%	31.8%
1977	240	63	26.2%	27.1%
1978	769	147	19.1%	29.1%
1979	582	111	19.1%	26.4%
1980	1	0	0	26.1%
1981	26	1	3.8%	11.5%
1982	0	0	0	0
All Years	5,516	972	17.6%	25.9% (inc. 1971)

61. The greatest P & M hiring at USS occurred in the years 1972, 1973, 1974, 1978, and 1979. Two-thirds of the class period hiring took place in the years 1972, 1973, and 1974 (3,639 hires); another one-fourth of the class period hiring took place in 1978 and 1979 (1,351 hires). More than 90% of all P & M hiring during the class period took place in 1972-74, 1978, and 1979. Virtually no hiring took place in 1975 (6 hires), 1980 (1 hire), 1981 (26 hires), or 1982 (0 hires). Only moderate hiring took place in 1976 (253 hires) and 1977 (240 hires).

62. Dr. Litwin's data show that, of the 5,516 persons hired into P & M jobs, 5,245—or 95%—were placed in entry-level unskilled laborer positions. Only 258 of the P & M hires—about 4%—were for skilled trade and craft positions. The remaining 13 P & M hires (only 1%) were for positions other than laborer or trade and craft.

63. Dr. Litwin analyzed the P & M applications and hires data by four different methods. Under each method of analysis, Dr. Litwin considered whether USS's hiring practices had a statistically significant disparate and negative impact upon black P & M applicants. Because virtually all applicants possessed the minimum qualifications USS had established for consideration for hire into entry-level P & M jobs[2] (see Finding of Fact No. 17, *supra*), Dr. Litwin's hypothesis was that blacks would be hired into the P & M jobs in proportion to their representation in the applicant pool. However, Dr. Litwin's statistical studies revealed that USS hired blacks into P & M jobs at a rate significantly below their representation in the applicant pool.

64. In his analyses, Dr. Litwin employed 1.64 standard deviations as the measure of statistical significance.

65. Dr. Litwin's first method of analysis (Method "A") examined the fraction of applications submitted by blacks which led to employment and compared it to the fraction of applications from non-blacks leading to employment. Measuring applicants and hires whose race was known, he found that during the class period only 7.6% of the black applications led to employment, whereas 12.9% of the non-black applications led to employment. This meant that at USS applications submitted by non-blacks had a 71% employment advantage over applications submitted by blacks.

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[2]Although the physical examination requirement may have screened out a significant number of applicants, USS's Mr. Edwards testified that physical examination failures did not occur in a racially disparate pattern. Therefore, this factor is irrelevant to Dr. Litwin's analyses.

66. Conducting the Method "A" analysis for each separate year within the class period, Dr. Litwin found that in the years 1972, 1973, 1974, 1978, and 1979 the fraction of non-black applications which led to employment was considerably larger than the fraction of black applications which led to employment. Dr. Litwin found these disparities to be statistically significant. In 1972, applications submitted by non-blacks had a 47% greater chance of hire than black applications. This advantage to non-blacks was -3.6 standard deviations from its expected value, meaning that the probability that such an advantage to non-blacks occurred by chance was less than 1 in 1,000. In 1973, blacks suffered a 77% disadvantage; in 1974, an 85% disadvantage; in 1978, a 76% disadvantage; and in 1979, a 68% disadvantage. The standard deviations for the years 1973, 1974, 1978, and 1979 ranged from -5 to -11 below the expected values.

67. When Dr. Litwin biased his Method "A" analysis in USS's favor by treating all applicants of unknown race as non-black and all hires of unknown race as black, non-blacks were still found to have statistically significant employment advantages in the years 1972, 1973, 1974, 1978, and 1979.

68. Over all years in the class period, using a weighted average fraction to measure the chances for hire by race, Dr. Litwin concluded that 12.6% of the black applications resulted in hire, whereas 21.6% of the non-black applications resulted in hire. Calculated in this fashion, black applications suffered a 72% overall disadvantage compared to non-black applications. This disadvantage was some 16 standard deviations below its expected value.

69. Dr. Litwin, using a second method of analysis (Method "B"), computed the expected number of black

hires (if blacks were hired in proportion to their representation in the applicant pool), and compared it with actual black hires at USS during the class period. For the period from July, 1972, through 1980 (1981 and 1982 were excluded because only 1 black was hired during those years), the number of expected black hires is 1,391. During that time only 971 blacks were actually hired by USS, yielding a shortfall of 420 blacks. This shortfall is more than 14 standard deviations below the expected value.

70. Dr. Litwin employed a third method of analysis (Method "C") to refine his calculations by taking into account when hiring decisions at USS were actually made and when applications were actually submitted. Considering the different dates when applications were actually filed, and using 18 different test assumptions as to the period of time USS considered applications to be active (beginning with the day of submission and ranging up to one year after they were first filed), the computer analyzed daily the percentages of blacks in various applicant pools. Referring to each such applicant pool, the computer then measured the difference between the expected and actual black hires for each of the 2,556 days in the period from January 1, 1973, through December 31, 1979. (This analysis could not be performed for hiring decisions made in 1972, because USS had destroyed the 1972 Job Applicant Log. Nor was it performed for the period 1980-1982, due to the absence of significant hiring activity.) Under all 18 test assumptions, the 18 applicant pools analyzed under Method "C" revealed statistically significant levels of black hiring shortfalls, ranging from shortfalls of 121 blacks to shortfalls of 241 blacks in the periods studied. These shortfalls ranged from 4 to 8 standard deviations below the expected values.

71. When the results of the Method "C" analysis are broken down by year (for the period 1973-1979 covered by this particular study), it appears that blacks suffered statistically significant hiring disadvantages in 1973, 1974, 1978, and 1979. The results of the Method "C" study, therefore, correspond to those obtained through Methods "A" and "B."

72. In a fourth method of analysis (Method "D"), Dr. Litwin further refined his calculations to ascertain for each P & M hire the precise period of delay between the date of application and date of hire. The computer was instructed to recreate exactly who was in the applicant pool during each hiring day when the persons hired submitted their applications. In this way, the timing and racial composition of each day's applicant pool was accurately measured. Once again, this analysis could not be performed for 1972 or the first half of 1973 because USS's destruction of the 1972 applicant log made it impossible to determine the applicant pools for persons hired in 1972 and early 1973.

73. Under Method "D", if applications are deemed to have a lifespan of 26 weeks, the overall black shortfall in P & M laborer hires was 192. This figure represents substantial shortfalls in 1973 (81 blacks), 1974 (82 blacks), 1978 (62 blacks), and 1979 (23 blacks). These shortfalls are statistically significant under Dr. Litwin's assumptions, showing -6.4 standard deviations for 1973; -6.0 standard deviations for 1974; -5.1 standard deviations for 1978; and -2.3 standard deviations for 1979.

74. Using a 52-week lifespan for applications, over the shorter period of January 1, 1974 through the end of 1979, the results show a P & M laborer hiring shortfall of 137 blacks. This is almost 6 standard deviations below the expected value.

75. Dr. Litwin checked the reliability of the data he used for his four principal studies, and tested the soundness of his conclusions, by reference to other data supplied by USS. Specifically, Dr. Litwin used a computer printout prepared by USS listing job applications and other information from 1973 to 1979, the Goodwin Report, and the AAQRs concerning P & M applications and hires. These alternative data sources supported the accuracy of the data used for, and the conclusions reached by, Dr. Litwin's principal studies.

76. During the class period, USS hired 258 persons for trade and craft, as opposed to entry-level, P & M jobs. Of these, 19—or 7.4%—were black.

77. Dr. Litwin did not perform analyses for trade and craft hires of comparable sophistication to those he performed for P & M hires overall because, prior to 1977, the JALs did not indicate whether an individual applied for a craft job or an entry-level P & M job. Instead, Dr. Litwin simply compared the percentage of black hires for craft jobs with the percentages of blacks in the overall applicant pools for the years within the class period. Although he found statistically significant shortfalls in black craft hiring for 1973 (shortfall of 9 hires), 1974 (shortfall of 10 hires), 1978 (shortfall of 3 hires), and 1979 (shortfall of 5 hires), his analysis does not address the possibility that the proportion of blacks who applied for craft jobs did not correspond to the proportion of blacks in the overall P & M applicant pool.

78. One of defendants experts, Dr. Bernard Siskin, performed a study similar to Dr. Litwin's for craft hires but restricted his study to the years 1977-1979 in order that he might compare black craft hires directly to black craft

applications. Dr. Siskin found a shortfall of zero for that three-year period.

79. Dr. Siskin testified that an assumption that proportionately as many black as white applicants were qualified as craftsmen would be unreasonable based on available census data and other information, including USS's JALs for 1977-1979.

80. Mr. Edwards testified that applications from minority craftsmen were rarely received, although actively solicited.

81. Dr. Litwin performed an additional study using the randomly selected applications of 1,566 successful applicants and 4,412 unsuccessful applicants. He found that 21% of successful applicants, but only 9% of unsuccessful applicants, had fathers who were USS employees. This supports an inference that having a father in the USS work force gives an applicant an advantage in the hiring process. Dr. Litwin also found that only 9.7% of successful black applicants had fathers employed at USS, as opposed to more than 26% of successful white applicants. This supports a finding that the practice of giving a hiring advantage to applicants with fathers in the USS work force had a disparate and adverse impact on blacks.

82. USS's work force from 1967 to 1978 was approximately 91.5% non-black.

83. Based on the results of his four distinct methods of analysis and the several data sources he considered, Dr. Litwin reached the firm conclusion that USS's hiring had a statistically significant negative and disparate impact upon blacks during the overall class period, and during each of the years 1972, 1973, 1974, 1978, and 1979. His conclusions were the same whether summer hires were included

or excluded, and whether persons of unknown race were included or excluded. His conclusions were the same after adjusting for clerical errors in recording race codes, after adjusting for the possibility that more black applications were recorded in the JALs than non-black applications, and after adjusting for the fact that some persons filed more than one application.

84. Dr. Litwin is a highly qualified statistician, and his presentation and conclusions were credible. The two defense experts who responded to Dr. Litwin—Dr. Siskin and Dr. Finis Welch—confirmed that the analyses Dr. Litwin performed in relation to the overall P & M applicant pool were appropriate, and that the results he obtained were reliable, given his data and assumptions.

85. Defendant attempted to impeach Dr. Litwin's conclusions by attacking the reliability of the data he used.

86. USS cannot in good faith attack the reliability of the JALs, which its own employees prepared as business records of the company, and which the company relied on when it was to its advantage to do so. USS used applicant flow data from the JALs to defend against numerous EEOC charges of race discrimination in hiring. USS also used applicant flow data from the JALs to prepare its AAQRs for submission to the United States government.

87. The fact that some persons submitted more than one application does not make the JALs unreliable, nor does it affect Dr. Litwin's conclusions. Defendant's expert, Dr. Welch found that a large majority, about 80%, of the applicants did not submit more than one application. With respect to those persons who did submit multiple applications, since USS did not consider applications that were more than one year old, applications from a single person

filed more than one year apart over the 10 year class period should be counted separately because each application triggered a separate USS hiring decision. In any event, the submission of multiple applications would be significant only if blacks submitted substantially more multiple applications than non-blacks. Dr. Litwin studied the number of applications filed by each successful black applicant and each successful white applicant. He found no significant difference in the frequency with which blacks and non-blacks submitted multiple applications.

88. Nonetheless, Dr. Litwin's analysis made adjustments for multiple applications. When an applicant was hired, he instructed the computer to delete from the applicant pool all applications submitted by the hired employee. Thus, these multiple applications were not considered when evaluating the racial composition of applicant pools for future hires. In making this correction, Dr. Litwin biased the adjustment in the defendant's favor by assuming that blacks submitted multiple applications more often than non-blacks did. Even with this built-in bias in favor of the defendant Dr. Litwin obtained results consistent with his other studies. Blacks would have to have filed multiple applications with a frequency almost twice that of non-blacks in order for Dr. Litwin's conclusions to begin to be affected. Even at the frequency, the results remain statistically significant overall, and for all individual years in which disparity was found except 1979. There is no evidence to suggest that blacks submit twice as many multiple applications per person as non-blacks.

89. Dr. Welch's method of attempting to determine how many repeated applications were in the JALs, treating as "identical" all persons having the same last name and

first initial, is not realistic or accurate. His approach incorrectly counted separate applications filed, for example, by Bob, Bert, Bruce and Bernie Jones as having been filed by one person. His approach improperly treated two applications, submitted by the same person several years apart during the class period, as one application. Dr. Welch admitted that his method overstated the number of multiple applications, improperly treating different individuals as the same, and that is could eliminate more blacks than whites due to fewer spelling errors or black applicants' names in the data.

90. Although Dr. Welch did find a slightly greater frequency of black multiple applications in the JALs when he incorrectly used just the last name and first initial, he also conducted an entirely separate study of multiplicity in the "applications file." There he identified multiple applications by social security number. This study gave a different result, showing that non-blacks filed multiple applications more often than blacks. Dr. Welch conceded that the use of social security numbers was a preferred method of testing for multiple applications. His second study had the effect of actually increasing the percentage of blacks in the applicant pool, and thus the racial disparity, because deletion of multiple applications would eliminate relatively more white applications.

91. The possibility that some applications might have been omitted from the JAL does not make the plaintiffs' employment data unreliable, nor does it affect Dr. Litwin's conclusions. The importance of the JALs is that they establish the percentage of black applications submitted. Missing applications would be pertinent only if proportionately more white applications were missing than black applications.

92. To test the accuracy of the JALs, Dr. Litwin compared actual applications to the JALs to see if each application had a matching JAL entry. Among the applications of persons hired into P & M jobs during the class period, Dr. Litwin found matching entries in the JALs for a very large majority, approximately 85%. Also, using a sample of more than 4,000 unsuccessful applications submitted during the class period, he found matching entries in the JALs for approximately the same percentage.

93. Dr. Welch studied some 30,000 retained applications and found matching entries in the JALs for at least 90-94%.

94. Dr. Litwin's analyses compensated for missing applications for persons who were hired into P & M positions. If he could not find an entry in the JAL for a person hired into a P & M position, he instructed the computer to add to the applicant pool a person of the same race as the person hired. In this way he completely corrected for the missing application. With or without this adjustment, he achieved the same results.

95. Dr. Welch's methods of matching to determine the extent of missing applications among the P & M hires were flawed. Dr. Welch tried to match using computer printouts typed by USS personnel, and not with the raw data itself, that is, the JALs and DERs. On a number of occasions his inability to find perfect matches was due to USS typing errors in the preparation of the printouts, and not due to an omission in the raw data. Moreover, by limiting the lifespan of the applications he wanted to match to only 270 days, he automatically prevented 10% of the hires from being matched because approximately 10% of persons hired had applications more than 270 days old. He obtained an artificially low match rate for 1973 hires by

starting to seek matches on February 1, 1973, despite the destruction of the 1972 JAL. This meant that anyone who was hired in 1973, but who applied in 1972, could not be matched. Finally, because Dr. Welch used a computer to do his matching, his results were depressed. A computer, being totally literal, would not match if there was a spelling error, even if the same person was actually in both data sources.

96. Even when Dr. Welch made adjustments to the data for missing applications he still found a statistically significant shortfall in black hiring, according to his report (D-335, p.52).

97. Most important, none of defendant's experts did studies which found that more unsuccessful white applications than black applications were missing from the JALs. In the absence of evidence of a racial disparity in match rates, missing applications are really a non-issue.

98. Dr. Litwin was the only expert who actually studied whether there was a racial disparity in match rates. He found there was no significant difference in the frequency with which entries for unsuccessful blacks and non-blacks were missing from the JALs.

99. Dr. Welch attempted to show that the employment data Dr. Litwin used were so sensitive that several minor "adjustments" could easily convert Dr. Litwin's demonstrated black shortfall into an excess of black hires. Dr. Welch's proposed adjustments do not undermine the validity of Dr. Litwin's analyses.

100. To support his adjustment theory, Dr. Welch chose only one of Dr. Litwin's 18 applicant pool combinations (D=0, T=52). The one he selected yielded a shortfall of 137 blacks, but ignored all of 1972 and 1973. Selection

of D=0, T=26 would have been more representative, with an overall gross shortfall of 248 blacks during the years 1973, 1974, 1978, and 1979. Thus, Dr. Welch's analysis began by understating the black shortfall and by ignoring two heavy hiring years. Moreover, although Dr. Litwin's Method "D" analysis was the sum of thousands of daily hiring calculations, the adjustments made by Dr. Welch were not. He incorrectly assumed that everyone in the class period was hired at one time.

101. In addition, Dr. Welch's adjustments disregarded the fact that Dr. Litwin had already adjusted for hires whose applications could not be found in the JALs. Dr. Welch's "minor" adjustment for missing applications in effect added some 30,000 more applications to the JALs, on the unsupported assumption that a high number of unsuccessful applications were missing from the JALs. This adjustment was inconsistent with Dr. Litwin's finding that there are not large numbers of unsuccessful applications missing from the JALs.

102. Dr. Welch admitted that he was not confident of his adjustment for race code errors. Even if he had been, Dr. Welch conceded it would have only a very minor effect. In any event, Dr. Litwin had already accounted for race code errors in his analyses.

103. Dr. Welch conceded that no hard conclusion could be drawn from his adjustments, and he was not willing to vouch for the numbers that they produced.

104. Based on the above, I find that plaintiffs have proved that disproportionately few black applicants were hired for entry-level P & M jobs, overall during the class period and during 1972, 1973, 1974, 1978, and 1979 in

particular, in relation to the number of blacks in the applicant pool for these jobs. Based on Dr. Litwin's presentation, I find that the shortfall in black entry-level hiring was statistically significant. (The legal significance of this fact will be discussed in my Conclusions of Law, below).

105. I further find that plaintiffs have not proved that disproportionately few black applicants were hired for trade and craft or other non-entry-level P & M jobs during the class period, in relation to the number of black applicants for these jobs.

106. Besides attacking the reliability of Dr. Litwin's data, USS asserted: (a) that it hired blacks in proportion to their representation in the labor market surrounding the plant; (b) that it did not hire at random to fill entry-level P & M jobs from among all those who met the minimum age, physical condition, and basic literacy requirements but rather sought at all times the "best qualified" candidate for any given opening; and (c) that any disparity between the percentage of blacks in the applicant pool and the percentage of blacks among those hired was due to the fact that a higher proportion of blacks than whites dropped out during the interviewing process, for one reason or another.

107. Mr. Edwards testified on behalf of USS that throughout the class period, USS sought to hire minorities in percentages sufficient to reflect at least the minority representation in the local labor market. Mr. Edwards and other USS employees decided that the relevant geographic labor market consisted of Lower Bucks County, Pennsylvania, and Burlington and Mercer Counties in New Jersey. Data USS obtained from Pennsylvania's and New Jersey's State Employment Services showed that minority representation in this geographical area was between 9.5 and 11.5 percent during the class period. However, Dr. Welch,

defendant's expert, testified that the local work force had 13.5% minorities.

108. The record is clear that, throughout the class period, USS hired minorities for entry-level P & M jobs at rates equalling or exceeding their representation in the geographical labor market defined by USS. (The legal significance of this fact will be discussed in my Conclusions of Law, below.) It is also clear that USS personnel believed that this fact discharged USS's legal responsibility to black applicants under the anti-discrimination laws and insulated USS from liability for discriminating against minorities in hiring.

109. By asserting that it hired only the "best qualified" applicants for entry-level P & M jobs, USS sought to undermine the basic premise of Dr. Litwin's statistical analyses: that, absent discrimination on the basis of race, one would expect black applicants to be hired in roughly the same proportion as their representation in the applicant pool. That premise would be correct, USS asserts, only if USS engaged in random hiring from among all persons who were 18 years of age or older and could pass a physical examination and read safety signs. On the contrary, USS states, the company puts all applicants through an elaborate application and interviewing procedure designed to determine which are best qualified to perform the physically and mentally demanding work of a laborer in a modern steel mill. According to USS, any discrepancy between the racial make-up of the applicant pool and the pool of those hired may therefore be assumed to be the result of real differences in qualifications between black and white applicants. The list of hiring criteria set forth in Finding of Fact No. 39, *supra*, represents USS's conception of the standards it applied to all applicants in order to

determine which were best qualified. USS not only conceded but underlined the subjectivity of the individual criteria as well as of the overall "best qualified" concept. USS emphasized that no single qualification or combination of qualifications would ensure either that a given applicant would, or would not, be hired, and that there was no set formula for balancing the various criteria in making any individual hiring decision.

110. An issue arose at trial as to whether USS would be permitted to supplement the list of its subjective criteria with an additional one, "promotability." For reasons which were adequately set forth in the record at trial, I concluded that defendant had foreclosed plaintiffs from inquiring into the issue of promotability as a hiring criterion during discovery, and I therefore excluded evidence concerning promotability at trial. Because defendant's motion for reconsideration of this evidentiary ruling was left pending at the conclusion of trial, I will take this opportunity to reaffirm it.

Although I stand by my earlier determination that the proffered evidence should be excluded because it would be unfair to allow defendant to assert at trial defenses it had deliberately foreclosed plaintiffs from inquiring into prior to trial, I would also emphasize that I do not believe the excluded evidence would have any effect, one way or another, on my analysis of this case. What is at issue here is the process by which USS hires individuals into entry-level P & M jobs. It cannot be seriously disputed that USS, like any other business entity, has a right, and perhaps a duty to its stockholders and the national economy, to hire the best qualified personnel it can. It is abundantly clear that ability to absorb on-the-job industrial training (which may be assumed to relate to native intelligence, alertness,

and judgment) is an important criterion in determining who is best qualified, even for entry-level jobs. It is also clear that the process by which USS divined who, among its applicants, were the best qualified was wholly subjective, consisting essentially of combining the gut reactions to the applicant of employees in the personnel office and one or more foremen in the plant. No evidence was presented or offered to show that applicants were tested in any way for ability to do specific tasks required of workers above the laborer level. Rather, the evidence was that those hired were expected to learn their initial jobs and any subsequent jobs they might be promoted into through on-the-job training. Given, then, that plaintiffs' statistical evidence showed that blacks were hired at levels significantly disproportionate to their representation in the applicant pool, this question remains: why did USS's wholly subjective process of culling out the "best qualified" applicants select whites for hire significantly more often than blacks, in relation to the racial make-up of the applicant pool? It is this question which I must answer as fact-finder. It is of no help to me to know that entry-level hires are frequently promoted unless there is also evidence that USS's hiring process was designed to, or did in fact, identify which applicants had the greatest ability to absorb on-the-job training, and that black applicants tended to possess this ability to a lesser degree than white applicants.

111. USS presented the testimony of Dr. Joan Haworth, an expert qualified in economics, econometrics, and employment discrimination matters, in support of its contention that it was reasonable for USS to attempt to hire the best qualified applicants. Not surprisingly, Dr. Haworth testified that it was not only reasonable but a necessary business practice for USS to attempt to hire the

best qualified applicants. As I have indicated above, I do not believe Dr. Haworth's testimony in this regard was controversial.

112. USS presented the testimony of Dr. Finis Welch, an expert labor economist, in support of its contention that any disparity between the racial composition of the applicant pool and the pool of those hired reflects actual differences in applicants' qualifications rather than racial bias in the selection process. Dr. Welch testified concerning a weighted probit analysis which he performed (the "Winner/Loser study"), statistically analyzing application information about selected successful and unsuccessful applicants to determine whether certain characteristics tended to give applicants an advantage or a disadvantage in hiring. This study purportedly demonstrated that "qualifications count" in hiring, but the study was inconclusive at best.

113. Although two-thirds of USS's hiring during the class period occurred in 1972, 1973, and 1974, Dr. Welch's study did not evaluate applications and hires at any time prior to 1976.

114. Dr. Welch constructed his Winner/Loser study to measure only a handful of the characteristics USS used to make hiring decisions. The study failed to take into account most of the factors USS used in its hiring decisions, such as attitude, initiative, personality, ability to communicate, interest, ability to meet work schedules, prior USS employment, personal references, etc.

115. Dr. Welch's study was based on non-random samples of successful and unsuccessful applications selected from an applications file maintained by USS. Dr.

Welch admitted that USS's applications file was incomplete and that the weighting and validity of his entire probit analysis were affected by the incompleteness of his data source.

116. Dr. Welch admitted that he was unable, with the data he possessed, to measure the quality of the applicant's prior work experience, but only the length of employment.

117. Dr. Welch's groupings and weightings of occupational experience were admittedly subjective.

118. The study ignored the work experience of persons employed less than one year, and equated the work experience of all others, whether they had worked one year, or ten years, or twenty years.

119. If the Winner/Loser study revealed anything about what USS looked for in its applicants, it showed that USS's conduct was bizarre. Dr. Welch found that an applicant who had spent 7 of the past 10 years working as a manufacturing operative had no better chance of hire at USS than a person who had never worked a day in his life. He found that an applicant with one year of experience as an assembly line worker in an ice cream plant was *more* likely to be hired by USS than an applicant with 10 years of experience as a steel mill laborer. He found that applicants who had a college degree or some college training had a reduced chance of hire at USS, as did applicants who had clerical experience. Ironically, he found that being white gave an applicant an "edge," that is, an increased probability of being hired.

120. Of the ten variables Dr. Welch analyzed, only one proved statistically significant under all three of the weighting systems he used. That variable was being a "new entrant" to the labor market, which meant that applicants

who had never worked before had the most statistically significant advantage in USS's hiring process. He found only two other variables to be statistically significant under any weighting system: having some college education (a disadvantage in hiring), and having manufacturing experience (an advantage). The advantage of manufacturing experience was less statistically significant than the advantage of being a new entrant to the labor market.

121. The Winner/Loser study did not show any relationship between the variables Dr. Welch measured and successful performance on P & M jobs. It did not attempt to determine whether the multitude of criteria USS used were job-related. Nor did it purport to show that blacks were less qualified than non-blacks, under USS's or any other criteria.

122. Dr. Welch candidly admitted that he lacked confidence in his Winner/Loser study.

123. Numerous problems were identified with the data Dr. Welch used for his Winner/Loser study and other analyses he performed, including the following. He used only a machine-readable listing of applicants, which had been prepared by USS. That applicant listing contained many coding errors for which Dr. Welch made no corrections. The listing contained no information about the job the applicant applied for prior to 1977. Dr. Welch never examined or used the JALs themselves. For information about those hired, Dr. Welch used a computer-readable document prepared by USS from the DERs. He never examined or used the actual DERs. He made no adjustments for errors USS had made in typing the computer-readable DER. His list of persons hired improperly excluded new hires if they had previously worked for USS

and improperly excluded summer hires. For some analyses, Dr. Welch improperly included hires at USS's Trenton facility. Finally, in certain calculations Dr. Welch used an "applications file" of retained applications, although it contained no unsuccessful applications filed prior to 1975.

124. The errors in Dr. Welch's data affected the results of his studies, particularly his matching studies of missing applications and his Winner/Loser study.

125. USS also presented the testimony of Robert Talley, an employee in USS's personnel office who was personally involved in making hiring decisions at USS during the class period, in support of its contention that a higher proportion of blacks than whites withdrew voluntarily from consideration during the hiring process or failed their physical examinations. Talley, who made no claim to statistical expertise, studied applicant and hire data for the first part of 1974. Talley concluded that, between December, 1973, and March, 1974, 18.1% of USS's applications came from blacks; that between January, 1974, and June, 1974, 13.2% of those hired were black; but that, in that same six-month period, 17.9% of all "job opportunities" were extended to blacks.

126. Because of numerous problems with his data and his methods, the Talley study is unreliable, and his conclusions may be discounted.

127. Mr. Edwards, Talley's superior in the personnel office, testified that there were no reliable USS records from which rates of applicant drop-outs or failures of physical exams could be determined. He also testified that the phenomenon of "dropping out" during the interviewing process, or after a job offer had been extended, occurred

"across the board," and that this did not occur disproportionately often among blacks. Nonetheless, Talley contended that if the higher drop-out and physical-examination-failure rates of blacks were factored in, blacks received their proportional share of job opportunities during the first six months of 1974.

128. The numbers Talley used to make his calculations were both overinclusive or underinclusive. When calculating the number of persons employed in the first half of 1974, he improperly included persons hired to work at USS's Trenton facility. On the other hand, he did not include all of the divisions at the Fairless Hills plant in his data. Moreover, his figures do not include applications submitted by persons seeking summer jobs, although they are members of the class.

129. Talley's calculations improperly compared six months of hires (January to June, 1974) against only four months of applications (December, 1973 to March, 1974). Talley assumed that during this period most applicants USS hired had submitted their applications within 30 days of their employment. Nonetheless, he did not compare June, 1974, hires against May and June applicants, nor May hires against April and May applicants, nor April hires against April applicants. Talley claimed that to use applicant figures for April, May, or June would have "tainted" the calculations because the JALs, he said, included summer applicants. However, applicants for summer jobs in 1974 were recorded in a separate summer JAL.

130. On rebuttal, plaintiffs showed that, had Talley included the applicant figures for just April and May, 1974,

he would have found that 25.1% of the applications submitted between December, 1973, and May, 1974, came from blacks.

131. Even if Talley's analysis, as corrected to include applications submitted in April and May, 1974, were credited, it would not explain the great disparity between 25.1% black applications and 13.2% black hires or even 17.9% black "job opportunities." Nor did USS present any evidence concerning "job opportunities" for any period other than the first half of 1974.

132. Based on all of the above, I find that defendant has not explained the statistically significant shortfall in black hiring for entry-level P & M jobs, vis-a-vis black representation in the applicant pool, during the class period, and particularly during the years 1972-74, 1978, and 1979.

133. There is no evidence from which I could find that any of the USS personnel office employees who testified harbor animus against blacks or are likely to have intentionally discriminated against black applicants.

Conclusions of Law

1. Plaintiffs having failed to present any evidence in support of Elbert Green's individual claim of disparate treatment, defendant is entitled to judgment in its favor on this claim.

2. Plaintiffs having failed to present any evidence in support of Robert Danley's individual claim of disparate treatment, defendant is entitled to judgment in its favor on this claim.

3. Plaintiffs having failed to present any evidence in support of the claims of class members who unsuccessfully

sought employment during the class period in USS departments other than the P & M department, defendant is entitled to judgment in its favor on these claims.

4. Plaintiffs having failed to demonstrate that defendant hired disproportionately few blacks for trade and craft or other skilled P & M jobs, relative to the number of blacks who applied for and were qualified for such jobs, they have failed to make out a prima facie case that the defendant discriminated against class members in hiring for non-entry-level jobs.

5. Plaintiffs have failed to make out a prima facie case that the defendant discriminated against class members in hiring for P & M jobs during the years 1975-77, 1980, and 1981. As plaintiffs' proof of discrimination rested on statistics, no discrimination may be found in those years in which, according to plaintiffs' own proof, blacks were hired at rates equally or exceeding their representation in the applicant pool, or in those years in which so little hiring was done that no valid conclusions can be drawn from the statistical evidence.

6. Plaintiffs established a prima facie case that the defendant discriminated against class members in hiring for entry-level P & M jobs during the years 1972-74, 1978, and 1979 by their statistical proof that the defendant's hiring practices during those years had a statistically significant disparate and adverse impact on blacks.

Discussion

[**1,2**] Plaintiffs' burden in establishing a prima facie case of discrimination under the disparate impact model is to show "that an employer's selection process results in the rejection of a disproportionate number of members of a protected group." *Connecticut v. Teal*, 457 U.S. 440, 102

S.Ct. 2525, 2537 n.3, 73 L.Ed.2d 130 (Powell, J., dissenting) (1982). The disparate impact model of proof may be applied to "practices which are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another and cannot be justified by business necessity." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336, 97 S.Ct. 1843, 1855, 52 L.Ed.2d 396 (1977). No proof of discriminatory intent is required under the disparate impact model. Rather, plaintiffs need only prove that the defendant's hiring practices "select applicants for hire . . . in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975).

[**3,4**] Aside from attacking the reliability of plaintiffs' data (which attack I have rejected in my Findings of Fact, *supra*), defendant has raised two legal arguments against plaintiffs' efforts to establish a prima facie case of disparate impact. First, defendant asserts that the disparate impact model is inapplicable where the selection process challenged employs multiple, subjective criteria. Second, defendant asserts that relevant labor market data, rather than applicant pool data, should be used to determine whether blacks were in fact adversely affected by the challenged hiring process. Both of these arguments must be rejected as contrary to authority and the policies underlying Title VII.

Defendant's contention that the disparate impact model may be used only to challenge a single, objective employment criterion is supported by a sole case, *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982). *Pouncy* is distinguishable, in that the court's rejection of the disparate impact model in that case was based on the

plaintiff's failure to give the employer adequate notice of what employment practice was being attacked, so that it could prepare its defense. *Id.* at 801.

Moreover, any contention that plaintiffs using the disparate impact model must limit themselves to attacking a single, objective criterion is contrary to the rationale of the Third Circuit's recent decision in *Wilmore v. City of Wilmington*, 699 F.2d 667 (3rd Cir. 1983). In *Wilmore*, the court sustained a class-action challenge to promotional criteria for firefighters, stating that:

> (T)he barrier to equal employment opportunities here is not so much the isolated tests as it is the overall process firefighters undergo to achieve promotion.

Id. at 671.

Finally, the *Pouncy* court's maverick assertion that the many cases which have approved use of the disparate impact model to challenge subjective, multiple-criteria hiring or promotional systems have been "incorrect," 668 F.2d at 800, was not supported by any case authority.

The leading case disapproving of the unguided use of subjective criteria to the disproportionate disadvantage of blacks is still *Rowe v. General Motors*, 457 F.2d. 348, 356-59 (5th Cir. 1972). *Rowe* and the numerous cases which have followed it [3] have recognized that, while subjective

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[3]A long string of cases after Rowe have inferred racial discrimination from evidence that application of subjective standards resulted in the allocation of proportionately fewer benefits to blacks than to whites. Courts have been most willing to infer improper application of subjective standards where the standards themselves are vague and not clearly related to the job, and where there is no review of an immediate supervisor's evaluation by higher levels of management. See, *e.g.*, *Fisher v. Procter & Gamble Mfg. Co.*, 613 F.2d 527, 545-46 (5th Cir.1980), *cert.*

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criteria are not illegal per se under Title VII and may be useful and necessary, they are suspect when their application leads to the disproportionate rejection of candidates from a protected group. Particularly when relatively vague subjective standards are given to a large number of individuals to be applied in whatever manner they see fit, with no systematic review to ensure fairness, the chances are great that conscious or unconscious racial bias on the part of some of those individuals will tinge the selection process. The problem with a selection system which employs largely subjective criteria is that its very vagueness makes the fairness of its application difficult to assess on a decision-by-decision basis. In fact, the results of such a system are virtually unreviewable unless discrimination may be inferred from racially disparate results. If defendant were correct in its legal position, relying on *Pouncy*, any employer could immunize its hiring, promotional and layoff selection systems from class-action attack simply by making them as standardless as possible, by diffusing responsibility for making employment decisions among as many individuals as possible, and by failing to review the

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(Continued)

denied, 449 U.S. 1115, 101 S.Ct. 929, 66 L.Ed.2d 845 (1981); *Robinson v. United Carbine Corporation*, 538 F.2d 652, 661-62 (5th Cir.1976), *modified on procedural grounds*, 544 F.2d 1258, *cert. denied*, 434 U.S. 822, 98 S.Ct. 65, 54 L.Ed.2d 78 (1977); *Senter v. General Motors Corp.*, 532 F.2d 511, 529-30 (6th Cir.), *cert. denied*, 429 U.S. 870, 97 S.Ct. 182, 50 L.Ed.2d 150 (1976); *Rogers v. International Paper Co.*, 510 F.2d 1340, 1350-51 (8th Cir.), *vacated and remanded on other grounds*, 423 U.S. 809, 96 S.Ct. 19, 46 L.Ed.2d 29 (1975); *Muller v. U.S. Steel Corp.*, 509 F.2d 923, 927-28 (10th Cir.), *cert. denied*, 423 U.S. 825, 96 S.Ct. 39, 46 L.Ed.2d 41 (1975); *Randolph v. U.S. Elevator Corp.*, 452 F.Supp. 1120, 1125-26 (S.D.Fla.1978); *Dickerson v. U.S. Steel Corp.*, 439 F.Supp. 55, 81 (E.D.Pa.1977); *Sarocini v. Missouri Pacific Ry. Co.*, 431 F.Supp. 389, 393-94 (E.D.Ark.1977). *Cf. Pate v. Transit District*, 21 FEP 1227, 1237 (N.D.Cal.1977) (standards were vague and subjective but disparate effect was more likely due to seniority).

results of those individuals' exercise of discretion. As *Rowe* and its progeny have recognized, it is precisely in this sort of setting that discrimination is most likely to occur.

[5] In this case, plaintiffs [4] proved that they are black; that they applied for jobs for which they possessed the minimal qualifications; that they were rejected, although others were hired; and that the hiring selection process under which they were rejected selected blacks for hire significantly less often than whites, in comparison to the racial make-up of the applicant pool. Further refinement of plaintiffs' definition of the hiring selection system they attack was made impossible by defendant's own refusal to be pinned down as to the selection criteria it employees, beyond listing the twenty subjective criteria set forth in Finding of Fact No. 39 and stating that these criteria were applied as an "amalgam." Under these circumstances, I conclude that plaintiffs have made out a prima facie case of disparate impact, and that it is fair to turn to the defendant for some justification of a selection process which produces apparently discriminatory results.

USS has attempted to convince the Court that plaintiffs had the burden, as part of their prima facie case, of presenting evidence that rejected black candidates were as, or better, qualified for entry-level P & M jobs as the successful white candidates for those jobs. The very amorphousness of defendant's hiring selection system, however, relieves plaintiffs of any greater burden with respect to demonstrating their own qualifications than they have carried. Defendants have established that the only *minimum* criteria for an entry-level P & M job were the age, physical

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[4] In this instance I am referring to those plaintiffs whose applications were active during the years in which statistically significant shortfall in black entry-level hires occurred—1972-74, 1978, and 1979.

condition, and basic literacy requirements that virtually all applicants presumptively possessed. From those who met these minimum criteria, defendant attempted to cull those it considered the "best" qualified. Defendant steadfastly refused to identify any single attribute or combination of attributes that would assure, or nullify, a minimally qualified applicant's chances of being hired. Had defendant identified such attributes, plaintiffs would have had to present proof that they possessed them (or did not posses them, in the case of negative attributes) as part of their prima facie case. It would obviously be impossible, however, for plaintiffs to present proof that they possessed as much or more "personality," "attitude," "alertness," "intelligence," "ability to communicate," and so forth, as those terms were understood and applied by defendant's various personnel interviewers and foremen, than the successful white applicants. Carrying defendant's argument to its logical conclusion, the mere fact that certain candidates were successful proves that they possessed more of the desired qualities, as subjectively measured by defendant's own employees, than unsuccessful candidates. In other words, if I accepted defendant's argument, its selection process would be self-validating.

Defendant's second argument—that labor market data, rather than information about actual applicants, is the preferred standard for determining whether its hiring practices had a disparate impact on blacks—requires little comment. While some courts have permitted plaintiffs to use labor market data to establish disparate impact where information about actual applicants was unavailable, or where applicant flow data understated minority availability due to the defendant's discouragement of minority applications, actual applicant flow data is the preferred

yardstick because it compares those actually hired to those who actually offered themselves for hire, rather than to a hypothetical pool of those "available" within a circumscribed geographical area. *See, e.g., United States v. County of Fairfax, Va.*, 629 F.2d 932, 940-41 (4th Cir.1980); *Hester v. Southern Railway Co.*, 497 F.2d 1374, 1379 (5th Cir.1974).

7. Defendant having failed to rebut plaintiffs' prima facia case of disparate impact in hiring for P & M laborer jobs in 1972-74, 1978, and 1979, plaintiffs are entitled to partial judgment in their favor on the issue of liability under Title VII.

Discussion

The plaintiffs having established a prima facie case of disparate impact, the burden shifted to the defendant to explain the disparity. I have explained my reasons for rejecting defendant's proffered explanation that blacks "dropped out" from the selection process more frequently than whites in my Findings of Fact and will restrict my comments here to the legal deficiencies of defendant's proof that it hired the "best qualified."

Defendant could not, of course, be found to have violated Title VII, whatever racially disparate impact its selection process produced, if the disparate impact were shown to be the result of the defendant's preferring better qualified candidates. The defendant, like any employer, has an absolute right to hire the best laborers it can find for its steel plant. The fatal deficiency in defendant's presentation of its proof in this case, however, is that it presented no evidence from which I could reasonably conclude that blacks, on the average, are less qualified to be laborers in

steel mills than whites, and that defendant's selection process fairly determined this to be so. To the extent defendant's argument suggests I should take judicial notice of the inferior qualifications of blacks, it is morally and legally offensive.

[6] It is not enough for the defendant simply to invoke the "best qualified" standard as a defense. In order to rebut a prima facie case of disparate impact, a defendant must demonstrate that the challenged selection criteria have "a manifest relationship to the employment in question." *Connecticut v. Teal*, 457 U.S. 440, 102 S.Ct. 2525, 2531, 73 L.Ed.2d 130, *quoting Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971). This means that a showing must at least be made that the criteria employed to define who was "best qualified" did in fact correlate with superior performance on the job and that the defendant's selection process accurately measured the degree to which applicants possessed the desired qualifications. The fact that members of the plaintiff class possessed the desired job-related qualifications to a lesser degree than non-members might reasonably be inferred from proof that fair and neutral application of demonstrably job-related hiring criteria resulted in the hiring of proportionately fewer class-members.

The defendant presented, through the expert opinion testimony of Dr. Haworth, evidence that its "best qualified" hiring standard, consisting of about twenty subjective criteria applied as an "amalgam," was a reasonable and necessary business practice. Dr. Haworth did not address, however, whether the defendant accurately measured the extent to which applicants were qualified, or whether its system was designed to ensure fair and racially neutral

application of those criteria. The evidence, on the contrary, was that application of defendant's "best qualified" criteria was left to up to 100 plant foremen, general foreman, and personnel office interviewers and clerks; that no systematic efforts were made to train these individuals in neutral application of the criteria, or to review the fairness of their decisions; and that, under the name of applying the "best qualified" standard, each individual decision-maker essentially simply consulted his or her "gut level" reaction to an individual applicant. Moreover, the one safeguard against discrimination that was built into the system—the requirement that a written record be kept of the reasons for an applicant's rejection—was largely ignored.

The defendant also attempted to present proof, in the form of Dr. Welch's Winner/Loser study, that differences in qualifications, rather than race, determined which applicants were successful. The shortcomings of this study are discussed in detail in my Findings of Fact. I will note here only that Dr. Welch's study did not even purport to demonstrate that those factors he identified as giving an applicant an "edge" were accurate predictors of success on the job.

The defendant's practice of preferring applicants with a relative in the USS workforce is an example of a seemingly non-job-related criterion which the defendant made no effort to validate. Another is the statistically significant "edge" factor, identified by Dr. Welch's Winner/Loser study (to the extent it is entitled to any credence), of being a new entrant to the labor market. Others of defendant's criteria—"ability to take directions," "alertness," "intelligence," and "ability to communicate," for example—would seem intuitively to be related to ability to absorb on-the-job and classroom instruction, an important and

legitimate job qualification for entry-level P & M workers, who are expected to learn all or most necessary job skills after they hired, directly from the employer. Yet these criteria are perhaps the vaguest and most subjective of all on defendant's list, and there is no evidence that the numerous interviewers and foremen entrusted with the task of determining whether applicants possessed them were able or, in all cases, willing to do so in an accurate and unbiased manner.

The fact that plaintiffs' statistical proof did not reveal a disparate impact on blacks in every year during the class period—while it might seem at first blush to belie the inference that defendant's subjective hiring process masked subtle and perhaps unconscious discrimination against black applicants—actually supports that inference when considered in the light of defendant's own explanation for the dramatic rise in the rate of black hires which occurred in 1976. [5] Defendant's witnesses testified that the percentage of black applicants called in for interviews in 1976 was subjected to a deliberate and substantial increase, with the aim of increasing the number of black P & M laborers who would thereafter become eligible for defendant's apprenticeship programs. The principal motive behind this action, as defendant frankly conceded, was to enable it to meet its obligations under previously entered consent decrees to increase minority representation in its apprenticeship programs. Not surprisingly, defendant succeeded in achieving a greatly increased percentage of blacks hired in 1976. In fact, 42.3% of the 253 applicants hired in P & M in 1976 were black. Defendants witnesses

[5] The extremely small number of total hires which took place in 1975 (6 hires, 2 black hires), 1980 (1 non-black hire), and 1981 (26 hires, 1 black hire) make it unnecessary to consider those years.

did not contend that they suddenly started to receive applications from better qualified blacks in 1976, or that they hired unqualified blacks in order to meet affirmative action goals that year. Rather, the events of 1976 demonstrate that defendant was capable of increasing the percentages of qualified blacks hired to equal or exceed black representation in the applicant pool by simply adjusting the call-in rates. This undercuts defendant's contention that the disproportionately low rate of black hires in other years was due to the inferior qualifications of black applicants.

Interestingly, when the pressure to meet consent decree goals lessened after 1976, the rate of black hires quickly sank back nearly to its former level. In 1977—which, like 1976, was a fairly light hiring year—the percentage of black hires was slightly below the percentage of black applicants. By 1978, when hiring increased, shortfall in black hires was once again occurring at statistically significant levels.

[7] In light of defendant's failure to rebut plaintiffs' prima facie case of disparate impact, the plaintiff class is entitled to judgment in its favor as to the Title VII claims of class members who sought P & M laborer jobs during the years 1972-74, 1978, and 1979.

8. Plaintiffs have failed to make out a prima facie case of class-wide disparate treatment in violation of Title VII or intentional discrimination in violation of 42 U.S.C. § 1981.

Discussion

Plaintiffs' alternate disparate treatment claim, under both Title VII and § 1981, is based on the theory that USS's use of relevant labor market data, instead of applicant flow data, to set its minority hiring goals constituted

the intentional setting of a discriminatory quota to limit black hires.

[8] Plaintiffs burden in a class-wide disparate treatment claim is to prove that the defendant intentionally and habitually discriminated against blacks on the basis of their race. Proof of intent is crucial, and the discriminatory intent which must be proved "implies more than intent as volition or intent as awareness of consequences .... It implies that the decision-maker ... selected ... a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeny*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979) (footnotes and citation omitted). "That an employer was aware of, or totally indifferent to the racially discriminatory impact of its hiring policies is not of itself sufficient to establish a prima facie case and shift the burden of explanation to the defendant." *Gay v. Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531, 552 (9th Cir.1982).

It is undisputed that defendant deliberately set its hiring goals for minorities on the basis of relevant labor market data, even though it was aware of the higher proportion of blacks in the applicant flow. It is also clear, at least to me, that the USS personnel office officials who set these hiring goals, with the approval of corporate management, did so in the sincere, though erroneous, belief that they were fulfilling the company's obligations under the anti-discrimination laws thereby, and not with any invidious purpose of disadvantaging black applicants.

The question presented, then, is whether plaintiffs can make out a case of intentional discrimination by means of statistical proof that a defendant's hiring practices had a disparate and adverse impact on blacks, together with

proof that responsible officials of the defendant were aware of the statistical facts but ignored them, not because they wanted to disadvantage black applicants, but because their mistaken view of the law led them to believe that the statistics in question were irrelevant to the issue whether their hiring practices had a disparate impact on blacks.

[9] Following the pronouncement of *Gay v. Waiters' and Dairy Lunchmen's Union, supra*, that mere indifference to the discriminatory impact of hiring policies is insufficient to establish a prima facie case of intentional discrimination, I conclude that plaintiffs' proof is insufficient. This is not a case like *Gay*, in which plaintiffs did not have access to the disparate impact model of proof and were forced to attempt to create an inference of discriminatory intent directly from statistical evidence of disparate impact. [6] Rather, plaintiffs here confine their use of the disparate treatment theory to challenging defendant's alleged setting of a quota to limit the total percentage of black hires. However, the defendant's lack of a hostile, discriminatory motive is unchallenged on this record. Plaintiffs have produced no evidence from which I could reasonably conclude that defendant's intent was other than

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[6]The burden of such plaintiffs is high. While statistical evidence of discriminatory impact is "an important starting point" in the inquiry whether the facts permit a legal inference of discriminatory intent, it is "rarely sufficient of itself." *Gay*, 694 F.2d at 552, citing *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). The plaintiff relying on statistical proof must show a stark pattern of gross disparate impact, as "statistics demonstrating that chance is *not* the more likely explanation are not by themselves sufficient to demonstrate that race *is* the more likely explanation for an employer's conduct." *Gay*, 694 F.2d at 552-53. *Cf. Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3rd Cir.), *cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975) (statistical proof that only 2 out of 3,129 claims adjusters hired during class period were women held sufficient to make out prima facie case of sex discrimination).

to follow the dictates of the law, as it misunderstood them. This is not the "discriminatory intent" which must be proved in a Title VII disparate impact case or a § 1981 case.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELBERT G. GREEN and ROBERT DANLEY, Individually and as representatives of persons similarly situated v. UNITED STATES STEEL CORPORATION	**CIVIL ACTION NO. 76-3673**

MEMORANDUM

Newcomer, J. August 1, 1986

On July 18, 1983 this Court held that defendant United States Steel Corporation (USS) violated Title VII by engaging in race discrimination against the class of black applicants who unsuccessfully sought employment in the production and maintenance department (P & M) at the USS Fairless Hills Plant during the following two periods: July 11, 1972 through December 31, 1974, and January 1, 1978 through December 31, 1979 (the "class period"). *Green v. United States Steel Corp.*, 570 F.Supp. 254 (E.D. PA. 1983) (liability opinion).[1] At the liability

[1]Plaintiffs also sought to hold defendant liable under § 1981, and under a theory of class-wide disparate treatment under Title VII, but this Court found no evidence of intentional discrimination in violation of 42 U.S.C. § 1981 nor sufficient evidence to make out a *prima facie* case of class-wide disparate treatment under Title VII. 570 F.Supp. at 277-78.

(Continued on next page)

stage, plaintiffs proved, through the use of statistical evidence, that USS failed to hire black applicants in proportion to their percentage in the applicant pool, and that this failure had a discriminatory impact on blacks. This Court found that USS, in its hiring procedures, relied on an amalgam of largely subjective criteria, and its interviewers were not trained so as to ensure even-handed application of the procedures. *Id.* at 260. Moreover, the minimum hiring criteria for P & M positions were so low that they did not eliminate many applicants.[2]

The liability opinion explicates in great detail this Court's findings and the reasons therefore, and I incorporate it as if set forth herein. Only those portions essential to an understanding of this opinion will be repeated when necessary.

Following the liability opinion, the Court directed the parties to meet, identify issues pertinent to relief, and develop any information necessary to calculate the damages to be awarded to the class. Order of January 12, 1984.

The parties were able to agree on a basic framework, to compile a stipulated set of damages calculations (Ex. P-200), and to focus on the several remaining contested legal issues.

(Continued)

Initially the certified class period ran from July 11, 1972 through December 31, 1981. However, the years 1975, 1980 and 1981 were excluded from consideration during the liability trial, because "very little hiring was done for P & M jobs at Fairless Hills" during those years. 570 F.Supp. at 257. The years 1976 and 1977 were also excluded, because in those years USS hired blacks at levels close to or exceeding their representation in the applicant pool. *Id.*

[2]"Anyone hired had to be at least 18 years old, pass a physical examination, and be able to read safety signs. . . . " *Id.* at 257.

Both sides fully briefed the following issues, now ripe for this Court's disposition:

1. Whether applicants for summer positions in 1972 and 1973 are included in the class.

2. Whether the decertification notice sent in *Dickerson* precludes unsuccessful black applicants in 1972, 1973 and 1974 from recovering damages in *Danley*.

3. The proper USS employee reference group to use to compute back pay and attrition rates.

4. Which fringe benefits, if any, should be included in a back pay award.

5. The appropriate method for calculation of mitigation of damages (interim earnings).

6. Whether USS should be given a "credit" for those years in which they did not discriminate against black applicants.

7. Whether plaintiffs are entitled to front pay, and if so, how it should be calculated.

8. Whether plaintiffs are entitled to prejudgment interest, and if so, how it should be computed.

9. Whether plaintiffs are entitled to any additional monetary compensation to account for the tax effect of lump sum payments.

10. Who should bear the costs relating to the distribution of damages (including the cost of notice to the class members).

11. Whether plaintiffs are entitled to injunctive relief and, if so, how it should be fashioned.

The parties also presented testimony, documents and arguments to the Court at the damages trial held April 7-14, 1986. This Memorandum Opinion shall constitute the Court's findings of fact and conclusions of law, as required by Fed. R. Civ. P. 52(a).

FINDINGS OF FACT

I. Stipulated Framework for Assessment of Damages

1. A central purpose of Title VII is "to make persons whole from injuries suffered on account of unlawful employment discrimination." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976) (*citing Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).

2. Title VII gives district courts significant latitude to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g).

3. The goal at the damages stage is to award plaintiffs complete relief in order to make them whole, while at the same time not awarding plaintiffs damages which will punish defendant or give plaintiffs a windfall.

4. The assessment of damages has been facilitated by numerous factual and legal agreements reached by the parties before trial. The Court finds these agreements, noted and summarized below, to afford a fair and reasonable approach to the calculation of damages owed the plaintiff class.

5. USS conceded that back pay was an appropriate element of damages due the plaintiff class, and that this

component "should be based upon the average annual wages earned by persons who were actually hired by USS in each of the liability periods." (Ex. P-200, Section IV at 11).

6. The Court finds it reasonable to calculate back pay in this fashion because, by definition, the plaintiff class was not hired by USS and therefore does not have an employment history at USS.

7. Moreover, the liability period spans almost ten years, the number of class members (approximately 13,000) greatly exceeds the jobs available even in the absence of discrimination (386). The subjective nature of the hiring criteria as employed by untrained interviewers, formed the factual basis for the liability opinion. 570 F.Supp. at 260, 269. Hence it is not practical to attempt to identify which members of the plaintiff class would have been hired but for the defendant's race discrimination.

8. Because the calculation of damages on an individual basis is not a feasible way to proceed, the parties have stipulated that damages should be calculated and distributed on a class-wide basis. (Ex. P-200 at 1). This approach has been adopted by other courts. *See, e.g., Hameed v. International Ass'n of Bridge Workers, Local 396,* 637 F.2d 506 (8th Cir. 1980); *Stewart v. General Motors Corp.,* 542 F.2d 445, 452 (7th Cir. 1976), *cert. denied,* 433 U.S. 919 (1977); *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211, 261 (5th Cir. 1974) ("[W]hen the class size or ambiguity of promotion or hiring practices or the multiple effects of discriminatory practices or the illegal practices continued over an extended period of time calls forth the quagmire of hypothetical judgment . . . a class-wide approach to the measure of back pay is necessitated").

9. The basic approach used to measure the plaintiffs' damages has been to ascertain how many class members would have been hired in each liability period in the absence of discrimination (the Black Hiring Shortfall); compute the value of wages and fringe benefits those persons would have received each year from USS; and determine the amounts of wages and fringe benefits those persons could be expected to have earned each year at other jobs after not being hired by USS. The annual excess of USS wages and fringe benefits over outside wages and fringe benefits is the net damages lost that year.

10. There are five liability periods; July-December 1972, and all of 1973, 1974, 1978 and 1979. 570 F. Supp. at 257, 263. Damages are calculated separately for each group of blacks who should have been hired during each liability period (*i.e.*, for each of the five "year class" cohorts), and for each such cohort to make damages calculations on a yearly basis, commencing with the year they should have been hired through the end of 1985. (Ex. P-200).

11. There were hiring shortfalls for permanent jobs in all five liability periods. Summer hiring shortfalls occurred in 1972 and 1973.

12. The annual shortfall figures were obtained by subtracting the actual number of blacks hired by USS as P & M employees in each liability period from the number of blacks who should have been hired in that liability period, had black applicants been hired in proportion to their representation in the applicant pool. The latter number was derived by multiplying the total number of USS hires in a liability period by the percentage of blacks then in the applicant pool.

13. This formula is in accord with this Court's liability ruling that, absent discrimination, blacks would have been hired by USS in proportion to their representation in the applicant pool.

14. The aggregate USS Black Hiring Shortfall, including both permanent and summer jobs, is 386 persons. (Ex. P-200, Section II).

a. The Black Hiring Shortfall for permanent jobs in each liability period is as follows:

1972	—	19 people
1973	—	101 people
1974	—	82 people
1978	—	74 people
1979	—	52 people
TOTAL	—	328 people

b. The Black Hiring Shortfall for summer jobs in the pertinent liability periods is as follows:

1972	—	6 people
1973	—	52 people
TOTAL	—	58 people

15. The Black Hiring Shortfall for the summers of 1972 and 1973 are "borrowed" from the figures for permanent employees for those years because the summer applications for 1972 and 1973 were destroyed.

16. The Black Hiring Shortfall is adjusted in each year subsequent to the year that a cohort class would have been hired, to reflect actual attrition by USS employees in the P & M department. This ensures that damages are not paid for employees who would no longer be employed by USS

in the normal course of events (*i.e.* even in the absence of discrimination). (Ex. P-200, Section III).

17. The attrition rates for P & M employees at USS were calculated and set forth separately in the Stipulated Damages Figures for white USS employees, black USS employees and all USS employees hired during the liability periods. (Ex. P-200, Section III).

II. Whether Summer Applicants for 1972 and 1973 Are Included in the Class

18. Fifty-eight people comprise the Black Hiring Shortfall for the summers of 1972 and 1973. The class certified by Order dated August 16, 1982 consisted of:

> All black persons who unsuccessfully sought employment at the Fairless Hills Plant of United States Steel Corporation between July (11), 1972 and the present.

570 F.Supp. at 256.

19. At the liability trial, the plaintiff class refined its liability periods of proof to exclude 1975-1977, 1980 and 1981. *See* note 1, *supra.*

20. At no time were the 1972 and 1973 summer applicants excluded, and in fact several references to summer applicants, in combination, support the inclusion of 1972 and 1973 summer applicants. *See* Findings of Fact Nos. 16, 23, 83, 123 and 128 ("Moreover, [Talley's] figures do not include applications submitted by persons seeking summer jobs, although they are members of the class."); Conclusions of Law Nos. 4-6 (summer hires included for the liability years; this Court explicitly excluded any portions of the certified class and unsuccessful theories in the liability opinion's conclusions of law).

III. Decertification Notice in Dickerson and its Effect, if any, on the 1972-1974 Members of the Danley Class

21. The Court incorporates by reference as if set forth herein the Memorandum and Order of March 31, 1981, where this Court addressed this issue and found that, based on the timely filing of the *Danley* action after the *Dickerson* notice became effective, the 1972, 1973 and 1974 unsuccessful applicants are included in the *Danley* class.

IV. The Proper USS Employee Reference Group For Computation of Back Pay and Attrition Rates

22. There is an unexplained disparity between USS wages paid to white employees and black employees during the liability years. (Ex. P-200, Section IV).

23. Plaintiffs advocate using white USS employees as the reference group for measuring back pay, on the grounds that: white applicants took the place of those black applicants who were not hired by USS; and if white USS employees do not provide the reference group, then the class members will be penalized twice—once for not being hired, and again in computation of damages.

24. While plaintiffs' position has some initial appeal, upon closer inspection their position is flawed. There was no evidence from which I could reasonably conclude that the acknowledged wage disparity resulted from discrimination against black employees, once hired at the Fairless Hills plant.

25. Defendant takes the position that the black USS employees are the proper reference group, as the group

"having employment characteristics most closely resembling those of plaintiffs and who were actually hired at that facility." Defendant's trial brief at 14.

26. This argument is inherently offensive, as plaintiffs point out, because the suggestion is that black employees perform like one another simply because they are black. The racial composition of a group of workers is not a legitimate "employment characteristic" upon which this Court may rely.

27. The Third Circuit has not yet been faced with the situation presented here, nor even with an analogous problem. The cases relied upon by both parties (from other circuits) do not provide much guidance in this area and thus I am faced with a novel issue.

28. With the exception of one case cited, plaintiffs cite cases which are inapposite because the cases involve *individual* calculations and/or discrimination in *post-hiring* employment practices (training, promotion, etc.).

29. These cases are not persuasive precedent because those courts usually had prior work histories with the employment characteristics for the class members involved. Also in measuring damages for one individual, a personal history could be obtained to find the closest match with another employee.

30. For example, plaintiffs cite to *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974), a class action suit involving discrimination by a cast iron and pipe manufacturer in its promotion practices. *Id.* at 217 & n.5. There the court instructed the trial court, on remand, to assess back pay damages on a class-wide basis. In

response to a suggestion by the Equal Employment Opportunity Commission (EEOC), the *Pettway* court recommended use of a class-wide formula " 'based upon a class of *whites* which would be comparable to the members of the effective class but for the discrimination,' " *id.* at 263 (emphasis supplied), because this method takes into account "actual *advancement* of a comparable group not discriminated against." *Id.* (emphasis supplied). Here there is no evidence of racial discrimination in post-hiring employment practices.

31. Individual advancement at USS is highly dependent upon such employment factors as overtime and individual incentive. Thus, in the absence of any evidence of racial discrimination in USS post-hiring employment practices, I cannot find it equitable or a good "match" to use white USS employees as the reference group.

32. Plaintiffs also rely on the Seventh Circuit case of *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976), *cert. denied* 433 U.S. 919 (1977), for the proposition that in a Title VII class discrimination suit alleging racial discrimination in *hiring and promotion* at one of defendant's plants, white employees were the proper reference group for back pay.

33. The *Stewart* court, in its opening paragraph, describes the case as one "concern[ing] claims of racial discrimination in *hiring and promotion* against General Motors Corporation at its Broadview, Illinois Parts Distribution Center" by a class of "black people who have been employed at this facility in hourly rated positions since December 21, 1983." *Id.* at 449 (emphasis supplied). However, a close reading of *Stewart* reveals that the suit deals only with discrimination in two types of promotions, and not at all with hiring practices. Consequently, when the

court recommends use of white employees as the reference group for a class-wide remedy, this suggestion encompasses a need to remedy racial discrimination against class members already hired by the defendant. *See* 542 F.2d at 453.

34. One case has advocated the use of whites as the reference group in a suit claiming racial discrimination in hiring, where the damages were calculated on a class-wide basis. *Hameed v. International Ass'n of Bridge Workers, Local 396,* 637 F.2d 506 (8th Cir. 1980).

35. In *Hameed,* blacks were denied entry into ironworkers apprenticeship programs from 1965-1973. Liability in *Hameed* was based on a disparate impact theory and the court calculated damages using the Black Hiring Shortfall model. In explaining to the district court its task for back pay computation, the *Hameed* court described back wages using *white* apprentices admitted to the program. *Id.* at 520-521. *Hameed* cites, *inter alia,* to *Stewart, supra,* for guidance in its formulation of class-wide apportionment of damages. Nowhere does the Court in *Hameed* explain why whites are chosen as the reference group. At best, it appears that the court did not reflect upon the issue of a reference group at all but rather, using *Stewart* as a model, assumed that white employees provided the correct reference group.

36. In the beginning of its back pay discussion the *Hameed* court set out the three issues of concern. *Id.* at 519. None of the three relates to which reference group is appropriate. Instead the court addresses the issues of class-wide versus individualized calculations, determination of the Black Hiring Shortfall, and a method to identify class members entitled to relief. *Id.*

37. Individual vicissitudes of employment earnings are too great to award the plaintiff class the highest back pay award available for workers in their putative division. I therefore find that the most equitable choice of employees for back pay (and as a corollary matter, attrition rates) is all USS P & M employees for the class periods (Ex. P.200, Section IV). I recognize, as I must, that taking the whole universe of P & M employees remains, at best, an imperfect fit, but it is the best choice in this case. As previous courts have frankly stated in cases involving a class-wide determination of back pay "[a]ny method is simply a process of conjectures." *Stewart, supra,* 542 F.2d at 453 (*citing Pettway, supra,* 494 F.2d at 261).

38. The USS wages lost by the class members and calculated by reference to the Black Hiring Shortfall (386 persons) is determined as follows: On a yearly basis the aggregate wages USS paid to *all* employees actually hired as P & M laborers in each liability period is divided by the number of P & M laborers working for USS in the given year. This yields average annual per capita wages at USS for each year within each liability period. These average amounts are then adjusted for attrition (using the attrition rates of all USS P & M employees at Fairless Hills), to reflect what the Black Hiring Shortfall (386 people) would have earned while working at USS through December 1985 (Ex. P-200, Section IV).

39. The average earnings are calculated for each entering class year, or cohort, on a yearly basis, by multiplying the Black Hiring Shortfall for each cohort in a given year by the average yearly earnings per capita. Each year the Black Hiring Shortfall is reduced to reflect attrition.

40. Using the tables from the Stipulated Damages Figures (Ex. P-200, Section IV) with all USS employees as

the reference group, yields USS wages for the Black Hiring Shortfall in the following amounts:

a. Permanent Jobs

Year of Hire	Average Earnings for All USS Employees
1972	$ 1,470,714
1973	7,341,084
1974	5,627,332
1978	4,153,546
1979	1,414,712
TOTAL	$20,007,388

b. Summer Jobs

Year of Hire	Average Earnings for All USS Employees
1972	$ 15,192
1973	137,072
TOTAL	$ 152,264

OVERALL TOTAL $20,159,652

V. Fringe Benefits

41. In addition to "straight salary" as a component of back pay, the plaintiff class is entitled to an award of fringe benefits. *See, e.g., Rasimas v. Michigan Dept. of Mental Health,* 714 F.2d 614, 626 (6th Cir. 1983), *cert. denied,* 466 U.S. 950 (1984); *United States v. Lee Way Motor Freight, Inc.,* 625 F.2d 918, 945 (10th Cir. 1979); *Pettway, supra,* 494 F.2d at 263; *Rosen v. Public Service Electric & Gas Co.,* 477 F.2d 90, 96 (3d Cir. 1973); *Shaffield v. Northrop Worldwide Aircraft Services, Inc.,* 373 F. Supp. 937, 945 (M.D. Ala. 1974). The dual purpose of this award is to

make plaintiffs whole and to deter defendant from future wrongdoing.

42. During the relevant time period, USS fringe benefits for laborers were better than those generally available for similar positions in the outside labor market.

43. In the earlier years, the cost of USS fringe benefits exceeded 50% of the hourly USS wages paid (Ex. P-200, at 104-07).

44. USS actively negotiates with the Steelworkers' Union for the salary package, which includes fringe benefits as a significant amount of each worker's total salary.

45. USS conceded that, as a general principle, the plaintiff class is entitled to some fringe benefits. However, defendant maintains that plaintiffs have not proven any loss and so have not sustained any recognizable damages for fringe benefits. In other words, defendant claims that each member of the plaintiff class must prove an actual loss prior to this Court awarding any fringe benefits.

46. I find that the fringe benefits were of great value to the plaintiff class. Accordingly, the question is how to calculate the allowable fringe benefits, and not whether to grant them at all.

47. A reasonable method for computation of fringe benefits for the class is to use the fringe benefits received by those USS P & M employees who were hired during the liability class years.

48. It is reasonable to conclude that the plaintiffs, had they been hired, would have received at least as much benefit from USS fringe benefits as actual USS employees received.

49. USS acknowledged that it would be impossible to ascertain the dollar value of USS fringe benefits received by each person who actually was hired by USS during each liability period.

50. USS is a self-insurer, and calculates its cost on an actual loss basis. At plaintiffs' request, USS provided the average cost to USS in each liability year for several fringe benefits. Notwithstanding these computations USS maintained that cost was not the proper measure of the value to plaintiffs of the fringe benefits. (Ex. P-200, Section V).

51. I find that the use of USS cost, rather than computation of loss for each member of the plaintiff class, is a reasonable method for calculation of fringe benefits to award plaintiffs under the circumstances of this case, for the reasons set forth below.

52. Plaintiffs are clearly entitled to some amount of some fringe benefits. USS cannot simply claim that the cost method is inaccurate without offering an alternative affirmative method of calculation. In this situation all of the relevant factual damages information resided with defendant, and was most easily usable or computed, by USS employees, if by anyone at all. While I remain aware that plaintiffs bear the burden of demonstrating their damages, when it is clear, as here, that plaintiffs are entitled to a fringe benefit award, I find it incumbent upon defendant to do more than simply say it does not agree with plaintiffs' computation efforts.

53. Second, I find that average cost for a self-insuring company like USS is a reasonable method of computation, and does not excessively overestimate the damages.

54. Last, to the extent that the average cost amounts are excessive, USS as the wrongdoer should bear the loss.

See, e.g., Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 83 (3d Cir. 1983).

55. USS presented the testimony of George Hensarling, USS Director of Employee Benefits for the past eight years, and an employee of USS for 38 years. Mr. Hensarling negotiates the contract with the Steelworkers' Union, and is responsible for administering all of the USS fringe benefits.

56. Mr. Hensarling testified that following USS's most recent contract negotiations with the union (March 1983), the base wage rate agreed upon for non-incentive jobs was $12/hour, with $11/hour for unworked hours—fringe benefits (such as insurance, pensions, etc.) and vacation, holidays and funeral leave.

57. During the middle of the damages trial a dispute arose as to the interpretation of the stipulated damages figures for fringe benefits.

58. Specifically, defendant argued that the fringe benefit costs in the stipulated damages were overinclusive, while plaintiffs believed these numbers represented the average fringe benefit costs to USS for the plaintiff class. For the reasons developed below, I find plaintiffs' position prevails.

59. During the damages discovery period plaintiffs asked USS to state the average per capita cost or value, for each year from 1972 through 1985 for each of the pertinent USS fringe benefits provided to USS P & M employees hired during the liability periods. (Exs. P-201, No. 5; P-203; P-204). This request sought the average yearly cost for the class members, had they been hired, beginning with the year of application and continuing through 1985.

60. On the same day as plaintiffs' request, defendant agreed to calculate the following:

> For each of the years for which liability has been found (July 11 through the end of 1972, 1973, 1974, 1978 and 1979) USS will identify by year class the total number of persons hired and for such hires the dollars paid as earnings, fringe or benefit payments for all subsequent years through December 1983 [later updated through December 1985]. We will determine the average dollars paid per individual per year class for each year subsequent to hire. This figure will be used as a base point for calculating back pay for each year class, from which will be subtracted the mitigation factor—i.e. average expectable earnings or benefits had the individual *not* worked at USS.

Letter of January 10, 1984 from USS counsel to plaintiffs' counsel.

61. Defense counsel added the caveat that the above calculations would be made to the extent possible using USS's data, and of course, without waiving USS's right to litigate the issue of plaintiffs' entitlement to fringe benefits and the use of cost as a proper measurement of damages.

62. What is clear even from the initial contacts during discovery is that the parties agreed to the accuracy of the calculations, and agreed to use these cost calculations as the measurement of fringe benefits for the plaintiff class, should the Court find plaintiffs were entitled to fringe benefits. Further they agreed that cost to USS was a reasonable method of measuring the value to plaintiffs in the absence of another reasonable method.

63. Plaintiffs' supplemental discovery request of October 31, 1985 reiterated their request for the cost of average

fringe benefits for class members. *See* Ex. P-204, for the definition of fringe benefits:

> "Fringe benefits" means all compensation, and benefits other than "earnings," provided to, for or on behalf of P & M hires, including F.I.C.A. contributions made by USS, unemployment compensation, supplemental unemployment benefits, pension, workers compensation and insurance (health, life, dental, S&A, and vision).

64. Using this definition, plaintiffs' request for admission No. 5 stated:

> Thomas P. Preston, Esq.'s letter of September 27, 1984, at page 3 (a copy of which is attached and incorporated) correctly states the total dollar cost to USS, per employee, by year, of each of the benefits listed therein, specifically "F.I.C.A.," Unemployment Compensation, Supplemental Unemployment Benefits, Pension Benefits, Workman's Compensation and Insurance (including Health, Life, Dental, S&A, and union).
>
> Defendant admitted Request No. 5.

65. At this point, at worst, plaintiffs' request for admission was inartful and a bit ambiguous, because plaintiffs ask for the "total dollar cost to USS, per employee," without adding that the "employee" referred to is of course, one who would be a P & M hire, the counterpart to the plaintiff class, since those were the figures the parties had agreed to use for purposes of calculating cost.

66. USS gave plaintiffs the "total cost to USS per employee," and thereafter, at successive times, always confirmed the accuracy of the calculations USS provided to

plaintiffs up to and including the first day of the damages trial. (*See* Exs. P-200, P-207, P-208).

67. At no time before trial did USS challenge the appropriateness of using the costs it had supplied, for calculating the cost of fringe benefits lost by the plaintiff class, should this Court determine cost was a reasonable method of fringe benefit calculation. (*See* Exs. P-208, P-209).

68. The annual cost to USS of each pertinent fringe benefit is set forth in the stipulated damages figures. (Ex. P-200, Section V).

69. On the third day of the damages trial, for the first time USS (through Mr. Hensarling's testimony) clearly revealed that its fringe benefit calculations not only included the plaintiff class, but also included any USS employees who are retired or who are on layoff, but who are still covered by USS benefits. Thus, according to USS, the calculations in the stipulated damages figures in Section V were grossly overinclusive.

70. Mr. Hensarling proceeded to testify to adjusted figures, using the stipulated damages as his base (Ex. P-200), to reflect the percentage of overestimate he believed would be a necessary reduction in order to reflect *only* P & M hires in a given year.

71. I reject Mr. Hensarling's percentage reductions for the fringe benefits of insurance, pension, and supplemental unemployment benefits (SUB), for several reasons.

72. As Mr. Hensarling admitted, USS did not disclose the substance of this portion of Mr. Hensarling's testimony in the sworn interrogatory responses it served on plaintiffs' counsel shortly before trial (identifying trial witnesses and

providing requested summaries of their expected testimony). *See* Ex. P-209, No. 2(a).

73. Mr. Hensarling was not involved in the case until approximately one week before the damages trial. Up to that point, USS was relying on Section V of the stipulated damages figures as accurate reflections of how to calculate any fringe benefits awarded to plaintiffs, in the event the Court decided that average cost to USS was a reasonable method of calculating fringe benefits.

74. This Court finds it difficult to believe that USS maintained all along that the fringe benefit cost calculations represented cost to USS for employees other than the counterparts to the plaintiff class.

75. USS did *all* of the calculations, without any representative from plaintiffs reviewing the raw data. If, at some point during discovery, USS determined (as Mr. Hensarling later testified) that it is impossible to extract P & M hires from USS total cost for insurance, then it was incumbent upon defendant to notify plaintiffs of this limitation in the data source.

76. It strains credibility to argue, as USS does, that all along, it knew and that it so communicated to plaintiffs, that the insurance calculations were overinclusive. USS knew that plaintiffs were relying upon its accurate portrayal of fringe benefit cost to USS for P & M workers hired during the liability years, as the matching counterparts to the class.

77. During the damages trial USS did not offer the Court any specific numbers to substitute for those in the stipulated damages figures. The first time any revised calculations were provided was as attachment to defendant's

post-trial pleadings. These revised tables are *not* in evidence.

78. Nonetheless, even assuming that USS's position is theoretically more accurate (thus putting to the side the misrepresentations to plaintiffs), USS did not present any credible evidence on which to base USS's suggested reductions of the insurance benefit calculations in the stipulated damages.

79. Mr. Hensarling conceded that his percentage reductions were "guesstimates," not based on more than his general sense of the people in the plaintiff class. Based on this speculation, Mr. Hensarling then offered percentage reductions of the insurance calculations, to exclude, *inter alia*, retirees and USS employees on layoff.

80. Mr. Hensarling also freely admitted that there were no "hard numbers" one could use to isolate insurance costs to USS for the plaintiffs' counterparts during the liability years, because the method of insurance claims handling for USS is company-wide. In other words, all USS's divisional insurance claims are lumped together.

81. Finally, to the extent the stipulated damages figures overestimate the fringe benefits due plaintiffs, the equities militate in favor of allowing these calculations to stand. As stated above, *USS*, not plaintiffs, were in possession of any and all data for the possible fringe benefit calculations. If these calculations would not isolate the plaintiff class, defendant had a duty to so inform plaintiffs.

82. I find that the most reasonable construction of plaintiffs' discovery requests and defendant's responses is that plaintiffs sought fringe benefits costs for the plaintiff

class counterparts, and that plaintiffs justifiably and reasonably relied on defendant's responses to provide calculations for that group alone.

A. Insurance Benefits

83. The benefits provided by USS to its P & M employees under the insurance program consist of life insurance, sickness and accident benefits (S&A), hospital coverage, physicians' services, major medical coverage, and dental and vision protection. (Exs. P-215 through P-221). Although USS employs an insurance carrier to process claims, USS is self-insured for its insurance program and thus is responsible for paying each claim. Mr. Hensarling described this as an "actual cost" system.

84. Mr. Hensarling testified that from the employees' standpoint, the USS insurance program is very good. It provides "first dollar coverage;" that is, the employee is not required to pay anything—no deductible and no coinsurance.

85. The level of sickness and accident coverage and the amount of life insurance provided to employees at USS are tied to the employee's wages, which is reviewed on an annual basis.

86. The USS sickness and accident program provides a source of income for employees who, as a result of illness or injury, are unable to work.

87. USS's hospitalization program pays employees or dependents for inpatient or outpatient treatment, including maternity benefits.

88. USS's physicians' services and major medical coverages pay for other medical expenses of employees.

89. The USS vision program pays for eye exams and the cost of glasses.

90. USS's dental benefits pay dental expenses of employees and their dependents.

91. The amounts set forth in the Stipulated Damages Figures are a fair and reasonable measure of the value of USS's insurance benefits to its employees and, in turn, to the plaintiffs. (Ex. P-200 at 39-51).

92. USS tried to limit or eliminate the use of these figures with Mr. Hensarling's testimony that each individual employee has hurdles to overcome (*e.g.*, minimum 520 hrs. of work before covered, review by USS of a claim before it is paid, etc.)

93. I find that any of these concerns do not undermine the validity of using an average annual cost to USS for its employees because on the whole, the average cost or pay-out by USS only reflects those people who have overcome those hurdles, and this Court has every reason to believe that the plaintiff class, on the average, would be similar to their counterparts who were hired by USS.

94. Insurance rates in the Stipulated Damages were calculated by multiplying the Black Hiring Shortfall for each year class (adjusted downward annually to account for attrition) by the average yearly insurance per capita (the cost to USS of providing insurance on a year-by-year basis for each relevant employee). This yields a total average yearly insurance amount per cohort.

95. For the reasons articulated as to straight salary portions of back pay, *supra*, I find that the proper reference group for insurance rates (and the other fringe benefits) is all USS employees.

96. Using the applicable charts in the Stipulated Damages (Ex. P-200, Section V) yields insurance benefits for the Black Hiring Shortfall in the following amounts:

a. Permanent Jobs

Year of Hire	Total Aggregate Insurance
1972	$ 236,358
1973	1,310,298
1974	1,153,578
1978	1,201,005
1979	613,325
ALL YEARS TOTAL —	$4,514,564

b. Summer Jobs

Year of Hire	Total Aggregate Insurance
1972	$ 4,406
1973	41,122
ALL YEARS TOTAL —	$ 45,528

(For the summer jobs, USS provided percentages of the overall yearly cost which may be fairly attributed to summer jobs.)

B. Pension Benefits

97. USS completely funds its pension plan, using actuarial estimates. Under the pension program, a USS employee who has ten years of continuous service receives a vested pension.

98. The type and amount of pension is determined based on such factors, *inter alia*, as age, continuous services at retirement and an employee's earnings history.

99. When an employee is on layoff, he or she continues to accrue pension rights for a period up to two years. In

addition, USS employees on layoff have recall rights for five years. Thus an employee who returns to active employment at USS within the five-year period maintains protected pension years accrued to date.

100. When an employee returns to active employment he or she receives another two year period for accrual of pension service. Thus, in order to receive a vested pension benefit, an employee need not actually work all ten years. For example: a member of the plaintiff class, if hired, could have worked for 4 years, then been on layoff for 2 years, worked for 2 years and then been placed on layoff again for 2 years. At the end of this ten year period, that individual would have a vested pension interest, although he or she worked for only 6 of the 10 years required for vesting.

101. The pension plan is funded on a group basis, not tied to an individual USS employee. Nonetheless, each year USS is obligated to make payments to the pension plan on behalf of every USS employee. The USS actuaries include in their annual calculation a factor for employee attrition.

102. As with the insurance calculations, Mr. Hensarling, at trial, testified to reductions in calculations for the plaintiff class pension benefits in the Stipulated Damages.

103. For reasons articulated above in the insurance section, I decline to adopt these eleventh-hour revisions.

104. In addition to the eleventh-hour nature of the calculations, Mr. Hensarling did not testify to data upon which I could rely.

105. The first time tables reflecting Mr. Hensarling's revisions were presented to the Court was in defendant's post-trial papers. These tables are *not* in evidence.

106. Moreover, this case from its inception has involved the use of complex and controlled statistical evidence. Mr. Hensarling admitted that his methods fell far short of this attempted precision.

107. For example, Mr. Hensarling testified that he "looked at" a recent liability year and found that approximately 38% of the funding went to employees for past service and 62% for current service. Based on this approximation (for which no documentation was supplied or even referred to) Mr. Hensarling decided to adjust the pension figures downward by 30%, to eliminate retirees who were not part of the plaintiff class.

108. Mr. Hensarling also conceded that although a USS employee's pension benefit does not vest until ten years of accumulated service, in the earlier years the amounts contributed by USS are designed to cover collection by USS employees in future years.

109. Mr. Hensarling testified that USS sometimes permits individuals to receive immediate lump sum payments when they leave USS in lieu of deferred payments under the plan.

110. Many persons USS hired for P & M entry-level jobs during the liability periods now have vested interests in the USS pension.

111. Of the 328 members of the plaintiff class who should have been hired for permanent jobs, at least 70 would still be working at USS, and others on layoff would

obtain future vested interests in the pension plan (Ex. P-200 at 4-10).

112. Mr. Braithwaite, USS Director of Corporate Employment (whose responsibilities include, *inter alia*, development of employment policies and procedures) testified that of the 1,486 P & M employees at Fairless Works currently on layoff, only about 100 of those have been laid off longer than two years.

113. Mr. Braithwaite also testified that all of the 1,486 P & M employees now on layoff may be recalled from layoff by 1990.

114. The amounts in the Stipulated Damages Figures are a fair measure of the per capita value to the plaintiffs of USS's pension benefits. (Ex. P-200, Section V at 26-38).

115. As with insurance benefits, the cost of the pension benefit has been calculated by year class with the Black Hiring Shortfall in each subsequent year reduced to reflect attrition. This adjusted shortfall is then multiplied by the average yearly cost per capital, for a total average cost in that year. When totalled, this yields the aggregate average benefit for that year class.

116. Using all USS employees as the reference group for pension benefits yields the following pension benefits for the plaintiff class, using the Stipulated Damages Figures (Ex. P-200 at 26-38).

Permanent Jobs		
Year of Hire		Total Aggregate Pension
1972		$ 160,150
1973		875,392
1974		807,028
1978		871,174
1979		449,889
ALL YEARS TOTAL	—	$3,163,633

C. Social Security Benefits

117. John Re, a USS employee for 30 years, and currently a Manager in Tax Accounting, is responsible for all payroll tax withholding (federal, state and local income taxes, social security taxes, and federal and state unemployment taxes). He testified to the nature of the social security program as it affects USS and its employees.

118. Social Security tax is deducted from each USS employee's pay. The employer pays an equal amount, and together the tax is paid to the U.S. Treasury on a periodic basis.

119. These amounts fund social security benefits. The payments in any given year fund social security benefits for current recipients. Thus specific funds are not designated to the currently employed individuals account, nor even segregated as to USS or another company.

120. In order to receive social security retirement benefits, an employee, at 62 years old, must have to his or her credit forty or more quarters of qualifying employment.

121. An individual's earnings over the course of his or her work history determine the payments to which he or she is entitled under social security. Accordingly, the higher the earnings, the greater the benefits, although the

rate of increase is not precisely proportional to the increased earnings.

122. Had the plaintiffs been hired, the quarters they worked for USS would be counted toward their social security coverage. Class members who were not hired by USS and did not find work elsewhere would receive no coverage toward the requisite forty quarters, because they would not be considered sufficiently attached to the labor market.

123. Had plaintiffs been hired, USS would have made social security tax payments on their wages.

124. Social security payments made by USS, while not tied to a particular employee, nonetheless confer a benefit on a USS employee which the plaintiffs would have received had they been hired.

125. Further, the USS wages—markedly higher than other laborer positions in the Philadelphia area—would have benefited plaintiffs by increasing their overall earnings.

126. At least two other courts have recognized that social security benefits are cognizable components of back pay recovery in discrimination cases. *See Blim v. Western Electric Co.*, 731 F.2d 1473, 1480 (10th Cir.), *cert. denied*, 105 S.Ct. 233 (1984) (social security payments by employer included in court's back pay award in age discrimination case); *EEOC v. Pacific Press Publishing Association*, 29 Empl. Prac. Dec. (CCH) ¶32,907 at 26,297 (N.D. Cal. 1982) (Title VII back pay award included social security tax payments, "on the basis that all monies paid are wages paid . . . or untaxed fringe benefits, as the case may be.").

127. Mr. Binkley, Staff Supervisor of Employment and Benefits at the USS Fairless Hills facility, testified that the

payment of employer social security contributions for a person who was improperly denied employment would be in keeping with the "make whole" concept.

128. Recognizing the inherent imperfection associated with the estimation of damages, yet keeping in mind the value of the social security payments to plaintiffs, I find that the amounts in the Stipulated Damages Figures are a reasonable and fair measure of the social security benefits to which plaintiffs are entitled.

129. Using all employees as the reference group, the Stipulated Damages Figures yields the following social security benefits for the Black Hiring Shortfall:

a. Permanent Jobs

Year of Hire		Social Security Benefits
1972		$ 132,667
1973		734,264
1974		638,680
1978		675,001
1979		344,899
All YEARS TOTAL	—	$2,525,511

b. Summer Jobs

Year of Hire		Social Security Benefits
1972		$ 790
1973		8,019
ALL YEARS TOTAL	—	$ 8,809

D. Workmen's Compensation

130. The purpose of the Pennsylvania Workmen's Compensation Act is to compensate for wages lost by employees who are injured during the course of their

employment. As a wage replacement, it has value to plaintiffs.

131. USS is self-insured as to workmen's compensation, making payments to employees based on actual injuries.

132. Mr. Billy Helm, a USS employee who is Manager of the Workmen's Compensation and Casualty, and who has 20 years experience in workmen's compensation matters for USS, testified that USS annually places in reserve a specific dollar amount for estimated future liability. The cost to USS per employee is maintained on an annual basis in order to predict the future cost to USS.

133. The Pennsylvania Workmen's Compensation Act protects P & M laborer employees at Fairless Works from their first day of employment.

134. Mr. Helm testified that because of USS's high hourly wage rates, employees at USS who are injured in the course of employment are entitled to the statutory maximum amount of compensation set by the Commonwealth of Pennsylvania.

135. Workmen's Compensation payments continue for as long as the disability continues.

136. Some employees hired by USS in each of the liability periods have received Workmen's Compensation payments. (Ex. P-209, No. 5(d)). Had plaintiffs been hired by USS, some of them would have received Workmen's Compensation payments. (Ex. P-209, Nos. 2 and 5).

137. The amounts in the Stipulated Damages Figures reflect, on an annual basis, the average per capita cost to USS for workmen's compensation.

138. Because the cost to USS is the best available source of the value to the plaintiffs of the fringe benefits, I find that the workmen's compensation cost calculations in the Stipulated Damages Figures are a fair statement of the annual per capita value to plaintiffs of the workmen's compensation payments.

139. USS did not offer any alternative method for computing workmen's compensation benefits, which can be viewed either as a fringe benefit or a wage replacement (since Pennsylvania is a wage-loss state). In either case, this benefit is clearly part of this Court's back pay calculation.

140. Using the tables from Stipulated Damages Figures with all USS employees as the reference group yields the following workmen's compensation benefits for plaintiffs:

a. Permanent Jobs

Year of Hire		Average Workmen's Compensation Benefits
1972		$ 43,116
1973		238,224
1974		210,013
1978		271,765
1979		143,554
ALL YEARS TOTAL	—	$906,672

b. Summer Jobs

Year of Hire		Average Workmen's Compensation Benefits
1972		$ 608
1973		2,741
ALL YEARS TOTAL	—	$ 3,349

E. Unemployment Compensation Benefits

141. The Pennsylvania Unemployment Compensation law established an employer-financed program to replace wages lost by claimants who become unemployed through no fault of their own.

142. USS makes periodic unemployment compensation payments to the Commonwealth for its P & M employees at Fairless. Those payments go into a general fund established by the Commonwealth for payment of unemployment compensation claims.

143. The amount of compensation to which an employee is entitled is determined by the wages that he or she received while working. Because the hourly wage rate at USS is so high, its employees are entitled to the maximum rate of compensation.

144. USS argues that its contribution (cost) to the unemployment compensation fund should not be awarded to plaintiffs as part of their back pay recovery because these employer contributions are not direct payments to employees, and because the Third Circuit has held that any unemployment compensation benefits received by a Title VII plaintiff should not be deducted from a Title VII back pay award, as part of mitigation or "interim earnings" or "amounts earnable with reasonable diligence," 42 U.S.C. § 2000e-5(g). *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 83 (3d Cir. 1983).

145. The *Craig* Court based this decision on the following characterization:

> Unemployment compensation most clearly resembles a collateral benefit which is ordinarily not deducted from a plaintiff's recovery. 721 F.2d at 83.

146. However, simply because receipt of unemployment compensation is not deductible does not mean that unemployment compensation is not a benefit which plaintiffs are entitled to receive as a component of their total back pay award.

147. This is distinguishable from *Craig*, because here I am not concerned with deducting receipt of unemployment compensation benefits received, but rather, with predicting or estimating the increased value of unemployment compensation benefits as USS employees, over and above any unemployment compensation benefits plaintiffs received while employees of another company.

148. Thus, although unemployment compensation benefits most closely resemble collateral benefits, in order to make plaintiffs whole, plaintiffs are entitled to the difference between the unemployment compensation benefits they would have received at USS and those they did receive, if any, while employed outside USS.

149. The best way to measure this fringe benefit to plaintiffs is to use the cost to USS, with a percentage deduction for fringe benefits, as agreed upon by the parties.

150. Admittedly an imperfect measurement, it is the best available method of calculating the value of unemployment compensation benefits to the average plaintiff.

151. Further, use of the cost figures serves the dual purpose of making plaintiffs whole and penalizing the wrongdoer. *Craig, supra*, 721 F.2d at 83 and n.2 (back pay " 'serves to work complete equity by *penalizing the wrongdoer economically* at the same time that it tends to make whole the one who was wronged' ") (emphasis supplied in *Craig*, quoting *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 787 (Powell, J., concurring and dissenting)).

152. I find that plaintiffs are entitled to an award for unemployment compensation benefits, as measured by USS's contribution to the unemployment compensation fund.

153. During any 52-week period of unemployment, an employee is entitled to an amount equal to 26 weeks of weekly unemployment compensation benefits, spread over the 52-week period.

154. A number of P & M employees hired by USS in the liability years were on layoff for at least some time since being hired. (Ex. P-209, No. 6). Had USS hired class members in the liability periods, they also would have experienced layoffs and would have received unemployment compensation benefits.

155. The amounts in the Stipulated Damages Figures are a fair representation of the per capita value to the plaintiffs of USS's unemployment compensation payments. (Ex. P-200 at 78-90).

156. Using the tables from the Stipulated Damages Figures, with all USS employees as the reference group, yields unemployment compensation benefits for plaintiffs in the following amounts:

a. Permanent Jobs

Year of Hire	Unemployment Compensation Benefits
1972	$ 42,032
1973	236,626
1974	201,473
1978	219,292
1979	108,305
ALL YEARS TOTAL —	$807,728

b. Summer Jobs

Year of Hire		Unemployment Compensation Benefits
1972		$ 608
1973		9,595
ALL YEARS TOTAL	—	$ 10,203

F. Supplemental Unemployment Benefits (SUB)

157. SUB is a contractually required payment that USS makes to its employees on layoff to supplement what they receive from the Commonwealth in unemployment compensation.

158. USS employees hired in the liability periods are entitled to receive SUB from USS for up to 52 weeks, after a two-year waiting period.

159. Mr. Hensarling acknowledge that SUB represents a valuable fringe benefit to a USS employee.

160. Had plaintiffs been hired, some of them would have received SUB benefits.

161. The amounts in the Stipulated Damages Figures are a fair representation of the per capita value to the plaintiffs of USS's SUB payments. (Ex. P-200 at 91-103).

162. USS contended, through the testimony of Mr. Hensarling, that the SUB amounts for the first two years for every cohort should be subtracted from the stipulated damages calculations to reflect a threshold requirement—namely that USS employees must have completed two years of continuous service before they are eligible for SUB.

163. I reject this adjustment. Mr. Hensarling admitted on cross-examination that his adjustment was overinclusive. His adjustment deleted not only the costs to USS for two years of new hires, but also costs for those USS employees eligible for SUB benefits.

164. Faced with a choice of under or over inclusiveness of damages, once again I find that defendant, as the wrongdoer, must suffer the loss, particularly because USS was in the best position to provide the most accurate data possible to reflect its cost of providing these fringe benefits to the plaintiff class.

165. Using the tables from the Stipulated Damages Figures, with all USS employees as the reference group, yields SUB benefits for the plaintiffs in the following amounts:

a. Permanent Jobs

Year of Hire		SUB Benefits
1972		$ 45,134
1973		257,578
1974		214,296
1978		211,296
1979		96,642
ALL YEARS TOTAL	—	$824,946

b. Summer Jobs

Year of Hire		SUB Benefits
1972		$ 1,063
1973		9,595
ALL YEARS TOTAL	—	$ 10,658

VI. Mitigation of Wages and Fringe Benefits

A. Mitigation Concept

166. The parties recognized that in determining damages under section 706(g) of Title VII, the amounts of lost USS wages and fringe benefits which 386 plaintiff class members could have earned at USS must be mitigated by amounts those persons subsequently earned, or with reasonable diligence could have earned, working at other jobs.

167. Defendant bears the burden of demonstrating the plaintiff class members' interim earnings, or amounts earnable with reasonable diligence. 42 U.S.C. § 2000-5(g).

168. All uncertainties or doubts should be resolved in favor of the plaintiffs, because of Title VII's dual goal: to make plaintiffs whole *and* to discourage employees from engaging in discriminatory acts.

169. Because it is impossible to ascertain which class members would have been hired by USS to fill the 386 jobs in question (of the approximately 13,000 class members), the efforts those 386 persons made to find employment elsewhere are unknown. Thus, the parties agreed to value the plaintiffs' mitigation efforts by developing profiles of the class members and use published data gathered by the government to compute the earnings of similar blacks living in the eight county region known as the Philadelphia Standard Metropolitan Survey Area (SMSA). The outside wages obtained from the census data are then to be subtracted from USS lost wages to yield the plaintiffs' net lost wages.

170. Both parties presented the testimony of highly qualified experts, who conducted mitigation studies for the

class by developing profiles of the class members, projecting outside earnings, and then computing net damages.

171. The court finds that it is appropriate to address mitigation by estimating outside wages on a class-wide basis as follows:

(a) by developing a profile of the class members in each liability period, based upon their age, sex, and educational traits because these traits, in combination, are considered statistically significant as earnings predictors; and

(b) by using those age, sex, and educational profiles to obtain estimates of black earnings from local labor force census information; and

(c) by basing such estimates upon earnings of blacks in the SMSA; and

(d) by accounting in some reasonable manner for persons who made no attempt to find work comparable to that offered by USS; and

(e) by accounting in some reasonable manner for inflation and real wage growth of the class members (including aging of the plaintiff class).

172. To mitigate fringe benefits, the parties stipulated to a formula for estimating the fringe benefits that the Black Hiring Shortfall would have received in the outside labor market. The ratio of outside wages to USS wages is applied to USS's cost of fringe benefits, yielding outside fringe benefits. The outside fringe benefits amount is then subtracted from USS's cost of fringe benefits, yielding mitigated fringe benefits. (Ex. P-200, Section V).

B. The Killingsworth Studies

173. Plaintiffs' expert, Dr. Mark Killingsworth, a labor economist, performed a series of analyses which satisfied the mitigation framework described above. He submitted an expert report detailing his studies (Ex. P-234), and he testified at trial.

(1) *Determination of USS Lost Wages*

174. Using the Stipulated Damages Figures, Dr. Killingsworth selected the average annual wages of white employees who were hired by USS during the liability periods as the appropriate measure of the wages that the class members would have received from USS had they been hired. His report also contained similar calculations using the earnings of all USS employees.

175. As the Court previously found, use of "all" USS employees is the proper reference group for determination of what plaintiffs would have earned at USS, had they been hired.

176. For those plaintiffs who should have been hired in each liability period, Dr. Killingsworth made annual adjustments to the USS wages to account for attrition.

(2) *Developing Class Member Profiles*

177. Dr. Killingsworth prepared class member profiles for each liability period. In doing so, he assumed that class members in any year possessed the characteristics and traits of those blacks that USS actually hired during that liability period. He also assumed that the traits that would be significant in determining outside earnings for the class would be age, sex and educational level. He did not assume that the traits of class members in one liability

period would be the same as traits of class members in other liability periods.

178. In developing each of his five class member profiles, Dr. Killingsowrth used information gathered by Dr. Litwin, an expert statistician who testified for plaintiffs at both the liability and damages portions of the trial.

179. Dr. Litwin made a random sample of employment applications submitted by blacks who were hired for P & M labor jobs at Fairless Works during each liability period. Dr. Litwin sampled the applications of approximately 530 black individuals who were hired by USS.

180. Dr. Litwin converted the following information obtained from the sample applications into machine-readable form: the sex/race code, the date of application, the date of hire, the year of birth, the number of years of education and the type of work requested.

181. From this computer-coded information, Dr. Litwin created cells, according to age, education, date of application, and year of hire.

182. Using Dr. Litwin's data base, Dr. Killingsworth developed five separate profiles of the blacks who were actually hired by USS in the years 1972, 1973, 1974, 1978 and 1979.

183. Dr. Killingsworth decided to use the profiles of the USS hires (rather than ones based upon unsuccessful applicants) for three main reasons: (1) he had information about the blacks USS hired in each of the liability years and thus was not required to speculate about their age, sex, and education characteristics; (2) those black class members who should have been hired by USS in each liability period would likely have resembled those blacks who were

actually hired by USS in that year; and (3) there was no reliable information about the age, sex and education traits of unsuccessful black applicants in years prior to 1975.

184. I find Dr. Killingsworth's articulated reasons for using USS hires to draw samples for his profiles (rather than using data drawn from the unsuccessful applicant pool) a persuasive method for preparing profiles. Accuracy in the profiles is particularly important since the "cell" groupings, *i.e.* the categories of sex age and education profiles, form the basis, or building block, for all of the calculations in Dr. Killingsworth's study, as they did for defendant's expert's study.

185. Dr. Killingsworth's use of and reliance upon profiles of blacks who were hired by USS in each liability year provides a sound basis for his conclusions about outside earnings of class members.

186. It is appropriate to use blacks as the reference group for computation of outside earnings (rather than whites or "all") because, as both parties agreed, black earnings in the general labor market remain traditionally lower on the average.

187. I recognize that using blacks as the reference group for interim earnings does not mirror the inside reference group ("all") but nonetheless find both choices proper. Inside USS the goal is to abrogate or at least to ameliorate any of the racial discrimination found in this Court's liability opinion.

188. By contrast, for interim earnings the Court is not trying to correct the injustice, but rather to measure earnings of plaintiffs or amounts plaintiffs with similar age, education and sex could reasonably be expected to earn in the outside labor market.

189. Both experts agreed that on average blacks earn less and face higher unemployment than whites.

190. As Emerson once said: "A foolish consistency is the hobgoblin of little minds." *ii Self Reliance,* Ralph Waldo Emerson.

(3) *Choice of Census Survey Data*

191. Dr. Killingsworth selected published information from the U.S. Censuses for 1970 and 1980 as his data source for estimating the outside yearly earnings of black class members in each year class.

192. The Census data is based upon a random sample of earnings and employment information about blacks in the Philadelphia SMSA.

193. There are approximately 500,000 blacks 16 years of age or older who are in the labor force in the Philadelphia SMSA.

194. The Census data is based upon a large sample. For example, the 1980 Census includes earnings information on approximately 19,000 black persons in the Philadelphia SMSA labor market. The data in the 1970 Census is based on information collected from approximately 5,000 such blacks.

195. The 1970 Census Data is based on earnings from 1969, and the 1980 census is based on 1979 earnings.

196. A large sample is preferable when the purpose of the study is to collect information about small subgroups, such as the various age, sex, and educational cells contained in each year's profile.

197. Dr. Killingsworth testified that any measurement errors or reporting errors that might be present in individual entries in Census data would tend to cancel themselves out when the data is used to project average numbers, as was done in his studies. I credit his testimony on this issue.

198. Dr. Killingsworth was more confident using the Census data than data from the Current Population Survey (CPS), because the CPS data is not randomly collected, it is derived from a very small sample, and it is less suited for the local studies required in this case. Dr. Killingsworth testified that, other things being equal, statisticians and labor economists have greater confidence in a survey based upon a large sampling population.

(4) *Labor Force Adjustment: Accounting for Persons who Did Not Attempt to Find Work*

199. Dr. Killingsworth's studies were designed to exclude persons who made no reasonable attempt to obtain other work. Conversely, he attempted to include those persons who worked or were not, for legitimate reasons, in the labor force.

200. Dr. Killingsworth submitted figures based on two methods of excluding people who did not attempt to find other work.

201. Under his first method—referred to as the "broader method" because it includes a larger group of persons—Dr. Killingsworth included the earnings of individuals: (1) who had been working or looking for work the week the Census was taken, or (2) who had worked in the two years prior to the Census.

202. Dr. Killingsworth testified that he took this approach because he did not want to exclude people simply because they were not in the labor force on a given date. Instead he looked over a span of time in order to ascertain who was at least making reasonable efforts to find comparable work (either by getting a job (in the last 3 years) or actively seeking a job during the past year.

203. Dr. Killingsworth also calculated mitigation earnings using a second approach, termed the "narrower definition." In order to be included in Dr. Killingsworth's narrow labor force definition, a person must have worked during the year preceeding the census—*i.e.* 1969 for the 1970 census and 1979 for the 1980 census.

204. In this narrower definition the status of a person's work history the week of the census and two years prior to the Census were not relevant.

205. Using his narrower definition of the labor force, Dr. Killingsworth's outside wages (mitigation earnings) increased somewhat, because fewer people with low or no earnings were included. This in turn lowers net damages against USS for back pay and fringe benefits.

(5) *Computation of Outside Wages*

206. After developing his five profiles and categorizing the age, sex and education characteristics of the hires into cells, Dr. Killingsworth assigned each cell a weight based upon the percentage of profile members in that cell. Applying that weighted average to the Census earnings of each cell group, Dr. Killingsworth was able to calculate the average annual outside earnings for each profile.

207. Since they were never actually hired by USS, Dr. Killingsworth had to estimate when the class members in

any year class would have begun work outside. Dr. Killingsworth assumed that the individuals would have been hired at evenly spaced intervals over the course of the year in question. Given that assumption, the average person was deemed to have begun work at mid-year. For the 1972 year, however, Dr. Killingsworth assumed that those hires began work on October 1 because that year class covered only the second six months.

208. Dr. Killingsworth properly assumed that the outside earnings of the class members would increase over time. He increased the wages each year by using a formula that considered changes in the earnings levels of the entire work force. This projection takes into account age and other factors affecting growth in wages, such as changes in the industry and characteristics of the overall work force. Dr. Killingsworth accounted for the increased earnings of each cell over time by increasing the Census earnings by the actual rate of growth in gross weekly earnings in the private non-farm economy. Dr. Killingsworth called this calculation a growth rate adjustment.

209. Defendant attempted to attack the reliability of this growth rate adjustment on two grounds: (1) the adjustment is not age-specific for each cell, *i.e.* Dr. Killingsworth's projection did not match each cell with earnings corresponding to that age group each year (because the Census data comes out only once every ten years); and (2) the projection method is not reliable because it lumps together all age groups (using an across-the-board percentage), which is not appropriate because the rate of wage increase is markedly higher for younger workers. This means that by using one percentage, the growth rate is artificially depressed for the majority of the class members

(because the class falls on the younger end of the labor force spectrum).

210. Neither attack persuades me to discredit Dr. Killingsworth's growth rate adjustment. Although this projection method is admittedly not cell-specific, it is considered a standard statistical technique, as conceded by defendant's expert.

211. Moreover, when Dr. Killingsworth used the 1970 Census earnings data (based on 1969 earnings) he used the age of a cell for that year class, without reducing the age of the cell under consideration.

212. For example, to calculate the 1973 outside earnings for a cell of 18-19 year olds in the 1973 year class, Dr. Killingsworth used the 1969 earnings for 18-19 year olds and then projected forward. Yet in 1969 these 18-19 year olds would have been 14-15 year olds. Had Dr. Killingsworth reduced the age for the cells to reflect actual age for the 1969 earnings data, the bases for outside earnings would have decreased, since average wages for 14-15 year olds are significantly less than those for 18-19 year olds.

213. I find Dr. Killingsworth's growth rate adjustment a reliable and valid method of accounting for the increase in outside wages to the class over the years.

(6) *"Credit Issue"*

214. If in any year the average wages of USS employees were less than the average outside earnings for class members, Dr. Killingsworth concluded that there were no damages suffered by the class members in that cohort for that year. (Ex. P-234, Exhibit B at 1).

215. Defendant challenged this "cancellation" of damages for a cohort in a given year, arguing that the "excess

wages" earned on the outside should be subtracted from the total net damages for that cohort (*e.g.*, the 1973 year class).

216. Plaintiffs' view on this credit issue prevails under the current case law. *See Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group); *cf. Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978) ("It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force.") (emphasis in original); *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1535-36 (11th Cir. 1984) ("averaging out" of discriminatory acts is not acceptable, and court therefore rejected defendant's "bottom line" defense).

217. Similarly here, although the type of discrimination involved requires damages calculation on a class-wide basis, it should be kept in mind that the class members are individuals, and therefore they should not be treated as fungible.

218. I therefore find that Dr. Killingsworth's "cancellation" is the appropriate treatment of those years where outside earnings exceeded earnings at USS.

219. After all of these adjustments, Dr. Killingsworth computed annual outside wages for each of the five year classes.

220. In sum, the outside wages obtained through Dr. Killingsworth's analysis through 1985, using his narrower

labor force adjustment and referring to all USS employees, were as follows:

Class of 1972	$ 884,787
Class of 1973	$ 4,102,274
Class of 1974	$ 3,553,784
Class of 1978	$ 2,679,322
Class of 1979	$ 1,113,855
	$12,352,022

(Ex. P-238)

221. Dr. Killingsworth also performed an outside wages study using the "minimum wage methodology." (Ex. P-234 at 17). This calculation assumes that the 386 class members who did not get a job at USS would have immediately found work elsewhere at the then prevailing minimum wage and would have worked 40 hours a week for 52 weeks a year. The same assumption is made for each year through the end of 1985. Under this methodology, Dr. Killingsworth found that the aggregate outside wages of the plaintiffs were $9,999,000, an amount lower than those obtained in his other methods.

222. This study was done as a "rough check" against his own studies to see whether this method might be a reasonable estimate of the plaintiff class' interim earnings.

223. The Court credits the testimony and report of Dr. Killingsworth and concludes that his analysis provides a fair and reasonable measure of the outside wages of the Black Hiring Shortfall people.

C. The Siskin Studies

224. Defendant presented the testimony of its expert, Dr. Bernard Siskin, who is qualified in the fields of statistics and econometrics. Dr. Siskin's studies followed the same basic format as Dr. Killingsworth, but the Court finds Dr. Siskin's studies less reliable, based on the use of skewed profiles, a less reliable outside source, and less reliable adjustments to account for aging and those members of the class who did not actively seek comparable work.

(1) *Choice of Reference Group for USS Wages*

225. In the body of his report Dr. Siskin presented mitigation figures using—for inside earnings—the earnings and attrition rates of "all" USS employees. (Ex. D-II-2). As an alternative (but not advocated) Dr. Siskin presented his net earnings with reference to white employees at USS.

226. As discussed *supra*, this Court has found that "all" USS employees are the proper reference group for the measurement of inside earnings.

(2) *Developing Class Member Profiles*

227. Dr. Siskin, like Dr. Killingsworth, sought to prepare profiles for each liability period, also using cell groupings by sex, age and education. However, Dr. Siskin did not prepare any profiles of blacks who were hired by USS in 1972, 1974, 1978 or 1979. Nor did he prepare a profile of unsuccessful black applicants in any of the five liability periods. Instead, Dr. Siskin based his study on a profile of hires for a single year (1973), "borrowed" that profile for 1972 and 1974, and then calculated a combined profile of hires and applicants for two years (1978 and 1979). (Ex. D-II-2 at 8-9).

228. Dr. Siskin combined the profile of hires and applicants in the latter years in order to create a larger sample. He testified that this was done because a larger sample "always gives you more precision."

229. Even though there were over 250 blacks hired by USS in 1972 and 1974, Dr. Siskin elected not to gather any information about those people. Instead, he simply assumed that the traits of the blacks hired in 1973 were identical to the traits of blacks hired in 1972 and 1974. Dr. Siskin performed no studies to determine whether his profile of the 1973 hires matched the actual characteristics of the 1972 and 1974 hires.

230. In constructing his 1978 and 1979 profiles, Dr. Siskin excluded all of the applications submitted by class members in the preceeding year which would have been considered by USS when hiring in the 1978 and 1979 years. For example, in constructing his 1978 profile. Dr. Siskin disregarded class member applications filed in 1977, even though a class member who applied in 1977 would have been eligible for consideration for employment at USS in 1978. This is so because job applications submitted to USS remained active for anywhere from six months to one year (570 F.Supp. at 259).

231. As a result of ignoring certain class member applications, Dr. Siskin conceded that he had used an "improper sampling frame" and that his study had a bias. Moreover, Dr. Siskin stated that his profiles were based on samples taken by Dr. Finis Welch, who did not testify at the damages trial. Dr. Welch's samples were apparently obtained in connection with the liability proceedings. This Court has previously rejected certain of Dr. Welch's studies drawn from the same data. (570 F.Supp. at 266-271, Nos. 95, 102-03, 112-24). The only effort made by Dr.

Siskin to test the accuracy of Dr. Welch's sample was to place a telephone call to an employee in Dr. Welch's office, and ask for verbal confirmation of the accuracy of Dr. Welch's data.

232. Dr. Siskin's cell groupings differed slightly from Dr. Killingsworth's but this difference was not identified as significant by either expert.

(3) *Choice of Current Population Survey*

233. Dr. Siskin relied upon the Current Population Survey (CPS) as his source of data for estimating outside earnings of those blacks in the Philadelphia SMSA who have traits like those in his three profiles. (Ex. D-II-2 at 6-7).

234. The CPS surveys certain families each year and, when published, provides information on earnings of those families for the previous year.

235. The CPS gathers information annually on only about 400 black persons out of the approximately 500,000 blacks in the Philadelphia SMSA labor force.

236. Dr. Siskin testified that the CPS is not a random sample.

237. Dr. Siskin conceded that for the liability years the CPS data includes only approximately 200 blacks 16 years of age or older in the Philadelphia SMSA labor force.

238. Dr. Siskin testified that if he had a choice between two different samples properly selected, he would prefer the larger sample because it would yield more reliable results.

239. Dr. Siskin nonetheless elected to use the CPS because it provides annual information, whereas the Census data, collected only once every ten years, requires projections for years other than 1969 and 1979.

240. Dr. Siskin conceded that if both a Census and a CPS survey were available in a given year he would choose the Census because of its far larger sample size. Dr. Siskin agreed that:

> The most widely known and used of the Bureau's [Bureau of Census] public use microdata files are the public use samples of basic records from the 1960 and 1970 censuses. These files provide the greatest range of demographic, socio-economic and housing variables; the entire country is covered and no segment of the population is left out. The large size of these files makes use even for relatively small areas (States, large SMSA's) possible.

241. Dr. Siskin admitted that, because of the small numbers, the CPS samples are designed for national, not local, studies. More specifically, Dr. Siskin agreed with the following comments on the CPS found in a publication by the Data User Services Division of the Bureau of Census:

> [T]he small sample size (relative to the census) of one in 1400 (approximately 50,000 households) severely restricts the potential for subnational analysis.
>
> and
>
> As indicated earlier, the usefulness of the Annual Demographic File [CPS] for subnational data such as for States or SMSA's is severely limited by the one in 1400 sample size.

242. Dr. Siskin also agreed with the following language distributed with the CPS by the Bureau of Census:

> It should be kept in mind that the sample design and methods of weighting CPS data are geared toward producing estimates for the entire nation. [In producing] estimates for States the user should be aware that the primary sampling units (PSU's) are drawn from strata which may or may not cross State lines. Consequently, the data would not be as reliable as national data, and the file may lose some of its utility in certain application[s].

243. In conducting its survey, the CPS asks questions of one person from each household. This person is not necessarily the head of household.

244. Dr. Siskin agreed that in collecting its data from various households, the CPS will question whoever answers the door so long as that individual is of a certain age. The CPS obtains its data from that individual even if that person is not the individual about whom the information is sought.

245. By contrast, the Census distributes written questionnaires to be filled out by the head of household. Both experts agreed that this method of data collection yields more reliable results, especially concerning questions on wages, which another individual in the household may not know as precisely as the wage earner.

246. Dr. Siskin agreed with the following statement about the CPS contained in a document entitled Concepts and Methods Used in Labor Force Statistics Derived from the Current Population Survey, published by the Bureau of Labor Statistics:

> Similarly the data are limited [by] the [adequacy] of the information [possessed] by the respondent and the willingness to report accurately. Usually a single respondent, generally the wife, reports for the entire

family. The respondent may not know all of the facts about family members or may be unable to report adequately on their attitudes or intentions. For example, the wife will probably know that her husband is working, but she may not always know exactly how many hours he worked or the precise nature of his job.

247. The CPS data is likely to be unreliable because of the small number of individuals in the sample. For example, 12.5% of the people in Dr. Siskin's 1973 class profile fell into the following four cells: (a) males age 20 to 24, high school education; (b) males age 25 to 34, high school education; (c) males age 20 to 24, non-high school graduates; and (d) males age 25 to 34, non-high school graduates. (Ex. D-II-2, at 16). All of Dr. Siskin's information on that profile was drawn from the CPS which, for that year, collected information on a total of only 24 individuals in those categories. By contrast, for those same four categories the 1980 Census provided data on a total of 2,932 persons.

(4) *Dr. Siskin's Labor Force Adjustments*

248. Dr. Siskin's analysis treated all time out of the labor force (as derived from CPS data) as proof of a failure to mitigate. Dr. Siskin also assumed that during that time out of the labor force, the person could have earned wages at the high USS rates. (Ex. D-II-2 at 6-8).

249. Dr. Siskin conceded that one can expect relatively large errors in the CPS information about people who have spent some time out of the labor force. He agreed that classification errors in labor force surveys may be particularly significant in the case of persons with marginal attachments to the labor force.

250. Moreover, in many years the CPS reports in clusters the periods of time in which individuals were out of the labor force. For example, the 1973 CPS has clusters for 1-13 weeks; 14-26 weeks, etc. Dr. Siskin relied upon the clustered data when making his labor force adjustments, using the midpoint week as the cutoff. He assumed that each person in a cluster had been out of the labor force for half of the time period covered by the cluster.

251. Thus, if an individual were reported by the CPS as being out of the labor force in the 14 to 26 week cluster, Dr. Siskin assumed that he had been out of the labor force for 20 weeks. Because he reduces damages for each week out of the labor force by USS earnings, this broad brush approach can significantly reduce the plaintiffs' damages.

252. Dr. Siskin incorrectly assumed that if an individual were out of the labor force for any reason, then USS would have no liability at all during the time that individual was not in the labor force.

253. Dr. Siskin made no corresponding adjustment to the wages paid by USS for time its employees were out of the labor force, nor did his study take into consideration the generous benefits available to USS employees during periods of layoff.

254. Although Dr. Siskin described his mitigation procedure as "precisely the same method that would be applied in an individual damage case," (Ex. D-II-2 at 8), he testified that his formula for calculating outside wages did not work for several hypothetical individual situations presented on cross-examination.

(5) *Aging Adjustment*

255. Dr. Siskin aged each of his three profiles for the class year, looking at the average age each succeeding year. He based this aging adjustment on the average age of a profile in a given class year at its inception.

256. Dr. Siskin conceded that he did not make any effort to ascertain the impact attrition would have on the average age of the class members. That is, Dr. Siskin's assumptions on aging the class did not take into consideration the possibility that the average class age could decrease from one year to the next.

257. Dr. Siskin admitted that if his profiles were incorrect, the results of his aging adjustment would not be right. Thus, if Dr. Siskin's use of the 1973 profile for 1972 and 1974 were incorrect, this could have the effect of inflating the value of Dr. Siskin's age adjustment.

258. Dr. Siskin agreed that if the actual class members had age traits different from those his profiles assumed, his aging adjustment would be adversely affected.

259. As I previously found, Dr. Siskin's profiles were flawed because of the lack of reliability of his data base source, and because of his non-random choices for profiles. Thus I also find Dr. Siskin's aging adjustment less reliable than Dr. Killingsworth's forecasting (real wage growth adjustment).

260. I also find Dr. Siskin's aging adjustment unreliable because he based the adjustment on the CPS—a data base choice inferior to the Census Data for this situation.

(6) *"Credit Issue"*

261. When, for any cohort outside wages in a year exceeded USS wages for that year, Dr. Siskin did not conclude that there were no damages suffered that year. Rather, Dr. Siskin penalized class members by crediting the "excess" outside wages in that year against USS damages due those plaintiffs in other years. He acknowledged that this "counterclaim" method decreased USS's liability by approximately $1.4 million.

262. I previously found Dr. Siskin's crediting of "excess" outside wages is not proper under the case law, and I reject his "bottom line" approach to Title VII damages.

263. Dr. Siskin used the actual starting dates rather than estimating USS start dates in a given year at the halfway point. While in theory Dr. Siskin's approach seems more accurate than Dr. Killingsworth's estimate of starting dates, Dr. Siskin conceded that the statistical effect of this choice is minimal.

264. In combination, considering the minimal overall effect of Dr. Killingsworth's estimate and the flawed nature of Dr. Siskin's profiles, I find start-date estimates sufficiently reliable.

265. Dr. Siskin's use of three biased or borrowed profiles to measure outside wages for five different year classes, his reliance on the meager CPS data, and his questionable age and labor force adjustments seriously flaw his analysis. I find Dr. Killingsworth's studies more reliable.

D. Damages Calculations and Recapitulation

266. The most appropriate method of calculation uses Dr. Killingsworth's studies, with "all" attrition rates and his "adjusted" or "narrow" definition of the labor force. (Ex. P-238).

267. The calculations breakdown is as follows (unless noted, numbers are derived from Ex. P-238):

a. Lost USS Wages for Permant Jobs (Finding No. 40(a))	$20,007,388
Less: Outside Earnings	12,352,022
Net Lost Wages for Permanet Jobs	$ 7,655,366
b. Lost USS Wages for Summer Jobs (Finding No. 40(b))	$ 152,264
Less: Outside Earnings	85,875
Net Lost Wages for Summer Jobs	$ 66,389
c. Lost USS Fringe Benefits for Permanent Jobs (Finding Nos. 96(a), 116, 129(a), 140(a), 156(a) and 165(a))	$12,743,054
Less: Outside Fringe Benefits	8,101,142
Net Fringe Benefits for Permanent Jobs	$ 4,641,912
d. Lost USS Fringe Benefits for Summer Jobs (Finding Nos. 96(b), 129(b), 140(b), 156(b) and 165(b))	$ 78,547
Less: Outside Fringe Benefits	44,286
Net Fringe Benefits for Summer Jobs	$ 34,261

268. Thus plaintiffs' total damages for back pay and fringe benefits, after mitigation, are $12,397,928. (Exs. P-234, P-238).[3]

VII. Front Pay

269. Plaintiffs also sought an award of front pay. USS is not currently hiring laborers in its P & M department, and in fact, USS has laid off many employees. Hence offering class members jobs at this time is not a practical alternative.

270. Front pay

> is an alternative to the traditional equitable remedy of reinstatement. *See White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1091 (4th Cir. 1977). The choice of such a remedy in lieu of an order that the plaintiff be reinstated rests in the sound discretion of the trial court. *Dillon v. Coles*, 746 F.2d 998 (3d Cir. 1984).

Goss v. Exxon Office Systems Co., 747 F.2d 885, 890 (3d Cir. 1984).

271. However, front pay "differs from a back pay allowance because it necessarily implicates a prediction about the future." *Dillon v. Coles*, 746 F.2d 998, 1006 (3d Cir. 1984).

272. The Third Circuit has not yet addressed the issue squarely presented by this case, namely whether front pay is a remedy available to a Title VII class of unsuccessful applicants, where proof of both liability and damages were

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[3]The final figure reflects a $2,000 increase over the total in Ex. P-238. The increase is a result of a computation error in the SUB benefits awarded. *Compare* Finding No. 165(a) *and* Ex. P-200 at 92, 95, 98, 100, 102 *with* Ex. P-239 at 3 (yearly SUB benefits inside USS provided for "all" P & M workers totals $824,946, not $822,946).

premised on statistics and averages, not on individual cases.[4]

273. Case law cited by the parties (from other circuits) supports an inference that front pay is available as a remedy for plaintiffs here. Nonetheless, I need not ultimately resolve the theoretical availability of front pay for plaintiffs, because assuming it were available, there is no evidence upon which I could reasonably conclude that plaintiffs are entitled to front pay. In an exercise of my discretion, I will not award plaintiffs any front pay, for the following reasons.

274. Plaintiffs concede that there is no way to determine how long it will take before USS begins hiring again. In all likelihood, USS will not resume hiring until at least 1990 or 1991.

275. Consequently, plaintiffs suggest an award of the mitigated wages for the years 1984 and 1985 (the two most recent years) as a reasonable "estimate" of front pay.

276. Plaintiffs did not lay any foundation for this conclusion. In stark contrast to the elaborate studies plaintiffs presented on their back pay calculations, for the front pay issue plaintiffs only presented a conclusory suggestion—pay the class two years worth of mitigated salary.

277. I agree with defendant that the proposed estimate is "sheer guesswork," and would require this Court to speculate wildly.

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[4]*Goss, supra,* involved an individual sex discrimination suit. This Court awarded plaintiff front pay for four months, based on evidence that this interim period was a reasonable estimate of the amount of time necessary for plaintiff to increase her earnings (based substantially on commissions) to her earnings level prior to defendant's discrimination. In *Dillon, supra,* another individual discrimination case, the Court of Appeals upheld the *denial* of a front pay award.

VIII. Tax Consequences of Damage Award

278. Plaintiffs seek an unidentifiable additional amount of damages to counteract any adverse tax effect resulting from the lump sum damages award.

279. Plaintiffs produced no evidence nor any persuasive argument on this claim, and I will therefore not award further damages.

IX. Prejudgment Interest

280. Although Title VII does not explicitly list prejudgment interest as an element of the available remedies, prevailing Title VII plaintiffs typically receive prejudgment interest. *See United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 940 (10th Cir. 1979); *Pettway v. American Cast Iron Co.*, 494 F.2d 211, 263 (5th Cir. 1974); *Davis v. Construction Materials, Division of Ancar Enterprises, Inc.*, 558 F.Supp. 697, 699 (N.D. Ala.), *aff'd mem.*, 720 F.2d 1293 (11th Cir. 1983).

281. This additional component of damages is in accord with the "make whole" purpose of Title VII relief, since but for the discrimination, plaintiffs would have received the money several years ago. *Davis*, 558 F.Supp. at 699.

282. However, the decision whether to award prejudgment interest in a Title VII case is committed to the sound discretion of the trial court. *See, e.g., Taylor v. Phillips Industries, Inc.*, 593 F.2d 783, 787 (7th Cir. 1979).

283. Plaintiffs seek prejudgment interest for the mitigated back pay and fringes awarded to them.

284. Defendant contests granting any prejudgment award. As an alternative position, defendant argues that if

any prejudgment interest is awarded it should not begin to run until July 1983, when the Court found defendant liable.

285. Were the sole consideration to make plaintiffs whole, I would be inclined to award plaintiffs interest from the date of the discriminatory act.

286. However, other equitable considerations temper my decision, and lead me to conclude that plaintiffs should be awarded prejudgment interest as of the date of the liability opinion (July 18, 1983). I arrive at this conclusion based on the following considerations.

287. As Judge Clemon in the Northern District of Alabama stated in the case of *Davis v. Construction Materials, supra,* 558 F.Supp. at 699-700:

> Prejudgment interest should ordinarily be awarded in Title VII cases, except in those instances where special circumstances would render such award unjust.

288. This is not a case of unjust enrichment. USS paid other individuals the wages and fringe benefits which they would have paid some of the members of the plaintiff class—the 386 persons who comprise the Black Hiring Shortfall. Thus, here defendant did not receive an economic advantage as a result of the discrimination.

289. This is not to say, as defendant argues, that unjust enrichment is a prerequisite to an award of prejudgment interest; rather, I am acknowledging the lack of economic benefit to defendant as a mitigating factor to be considered in fashioning an equitable remedy.

290. Next, in the liability opinion I specifically found that "plaintiffs have failed to make out a prima facie case of class-wide disparate treatment in violation of Title VII

or intentional discrimination in violation of 42 U.S.C. § 1981." 570 F.Supp. at 277, Conclusion of Law No. 8.

291. I find that defendant's lack of *intentional* discrimination is another important mitigating factor in defendant's favor.

292. Moreover, plaintiffs' proof at both the liability phase and damages phase rested upon complex and sophisticated statistical analyses. Neither the liability decision nor the scope of damages could have been easily forecast by defendant.

293. In fact, cases from other circuits have gone so far as to find that when back pay amounts are not easily ascertainable, prevailing Title VII plaintiffs may not be entitled to prejudgment interest. *See, e.g., Domingo v. New England Fish Co.*, 727 F.2d 1429, 1446 (9th Cir. 1984) ("The fact that the amount of back pay is not easily ascertainable weighs against awarding prejudgment interest").

294. On balance, I find that plaintiffs are entitled to some extra compensation for not having the money they would have already received from USS, but for the discrimination. The prejudgment interest will further the "make whole" goal.

295. In an exercise of my discretion, I find the most equitable decision is to award plaintiffs prejudgment interest, to run from the date of liability (July 18, 1983), until the date of final judgment. *See Falcon v. General Telephone Co.*, 463 F.Supp. 315, 316 (N.D. Tex. 1978), *aff'd in part, remanded in part on other grounds*, 626 F.2d 369 (5th Cir. 1980), *vacated on other grounds*, 450 U.S. 1036 (1981) (Title VII class action suit where the court calculated prejudgment interest from the date of the liability opinion until the date of final judgment).

296. The Third Circuit cases of *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 889 (3d Cir. 1984) (court upheld, without comment, an award of prejudgment interest in individual Title VII case) and *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 82 (3d Cir. 1977) (same), do not mandate another conclusion.

297. Prejudgment interest will be awarded using a fluctuating rate, pursuant to 26 U.S.C. § 6621 (the statute setting the interest charged or paid by the IRS on underpayments or overpayments of taxes), as adopted by courts in Title VII cases. *See EEOC (U.S.A.) v. Pacific Press, Publishing Ass'n*, 482 F.Supp. 1291, 1319-20 (N.D. Cal. 1979), *aff'd*, 676 F.2d 1272 (9th Cir. 1982); *EEOC v. Stone Container Corp.*, 548 F.Supp. 1098, 1108 (W.D. Mo. 1982); *Davis, supra*, 558 F.Supp. 697 (N.D. Ala. 1983). This interest shall be compounded quarterly. *Pacific Press, supra*, 482 F.Supp. at 1320.

X. Injunctive Relief

298. In the liability opinion, this Court found that USS employed mostly subjective criteria in its hiring practices, and that these subjective criteria were then used by untrained interviewers to hire laborers for the Fairless P & M department.

299. Specifically,

> When making hiring decisions, USS's evidence was that its interviewers evaluated applicants using the following hiring criteria: education; work experience; attitude; initiative; personality; ability to take directions; alertness; intelligence; physical fitness (that is, physical restrictions); ability to communicate; military experience or training; vocational training; ability to

meet work schedules; prior criminal record; familiarity with industrial or factory work; interest; prior employment history at Fairless Works; personal references; citizenship or alien status; having a relative in the USS work force; and age. Most of these criteria are wholly subjective. As to those criteria which can be objectively measured, such as education and work experience, USS employed no uniform system in assessing one applicant's qualifications vis-a-vis another's. Nor were the various interviewers and foremen trained in any way as to what the different criteria meant or how to implement them uniformly, although many of them are vague and all are subject to differing interpretations. (570 F.Supp. at 260, No. 39).

300. Preliminary interviews of applicants were conducted by an interviewer in the USS personnel department. The applicant was then interviewed by the foreman or general foreman of the operating department needing new employees. The foreman or general foreman had the authority to accept or reject the applicant. (570 F.Supp. at 259, No. 35).

301. "Although the USS Procedure for Uniform Employment Practices required all interviewers to be trained, USS did not train its interviewers other than through on-the-job exposure to other interviewers' techniques. Nor did USS have any minimum education or work experience requirements for persons hired as interviewers." (570 F.Supp. at 260, No. 37).

302. In the absence of some directive from the Court, USS stated it has no intention of giving class members a hiring preference.

303. USS has no intention of advertising P & M job openings at Fairless Works and prefers to rely on word-of-mouth to fill openings.

304. USS has not adopted, nor does it plan to adopt, a policy to insure that blacks are hired in proportion to their percentage in the applicant pool.

305. Since the liability trial (three years) USS has not developed any new criteria for hiring P & M employees at Fairless. Moreover, USS has not, except for a hand dynamometer test, validated any of the selection criteria which have to this point been used at Fairless.

306. USS has neither validated nor prohibited use of the practice at Fairless of giving a preference to P & M applicants who have a relative at USS.

307. David W. Braithwaite, 30-year employee of USS and the Director of Corporate Employment since November 1, 1974, testified on behalf of defendant regarding matters concerning any need for injunctive relief.

308. Mr. Braithwaite testified that currently there are 2,786 active P & M employees at Fairless and 1,486 employees on layoff.

309. USS does not anticipate hiring for P & M positions at Fairless until 1990 or 1991.

310. When such hiring does begin, Mr. Braithwaite testified that USS will use the Pennsylvania Bureau of Employment Security (BES) as the *exclusive* source of candidates for labor positions.

311. USS has had only "very brief" discussions with BES regarding that agency's ability to act as the source of entry-level P & M referrals.

312. In answers to interrogatories, USS identified William J. Binkley, Staff Supervisor-Employment Benefits at Fairless, as one of the individuals who is responsible for administering, implementing and/or enforcing USS's recruitment and hiring plans. (Ex. P-207, No. 17).

313. Mr. Binkley has been in this position at Fairless for over a year now. Nonetheless, he has had no discussions with anyone at USS regarding the prospect of using the Bureau of Employment Security as the source of referrals for P & M positions.

314. In fact, as Mr. Braithwaite and Mr. Binkley testified, no one from USS has ever discussed with Mr. Binkley his "new" responsibilities for reviewing applications for the P & M department.

315. Apparently, because USS does not foresee hiring for P & M positions at Fairless until 1990 or 1991, Mr. Braithwaite does not view training or preparation of those who will oversee or interview necessary at this time.

316. I am dismayed by this seemingly lackadasical attitude, given this Court's liability findings on the subjective nature of the hiring tests, compounded by the unfettered exercise of control by the interviewers.

317. To ensure USS's compliance with its obligations under Title VII in general, and this Court's liability findings in particular, an injunction is warranted and appropriate, notwithstanding USS's beginning efforts at changing their hiring practices. *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1135 (8th Cir.) ("once discrimination has been established in a Title VII action, the issuance of an injunction rests in the sound discretion of the district court, even if the employer has begun to comply with the law in good faith"), *cert. denied*, 454 U.S. 969 (1981).

318. Plaintiffs seek several forms of injunctive relief—invalidation of hiring criteria, extensive communication and publication of job opportunities, centralized interviewing, records retention, compliance reporting, proportionate black hiring and hiring preferences.

319. All, save the final two—proportionate black hiring and hiring preferences—will be included in the permanent injunction order.

320. The granted injunctive relief goes to the heart of this Court's liability findings—namely, that USS used subjective criteria, applied by untrained interviewers with unchecked authority, to hire P & M workers at the Fairless plant. These practices, in combination, had a significant discriminatory impact on black applicants.

321. As a corollary to this subjective, haphazard hiring procedure, I found that USS destroyed thousands of the applications from the earlier liability periods.

322. Thus, injunctive relief directed at correction of the discriminatory hiring practices and procedures is a completely appropriate remedy. The validation, centralization, publication and record-keeping aspects of the injunction are all aimed at correcting the discriminatory practices found here. To the extent these practices also aid black individuals who were not members of the class, such a result is permitted under the very recent Supreme Court case of *Sheet Metal Workers v. EEOC*, No. 84-1656 (U.S. July 2, 1986).

323. As for the race-conscious elements of the injunctive relief sought by plaintiffs, in the exercise of my discretion I decline to order hiring goals or other numerical or percentage affirmative action plans, for the reasons enumerated below.

324. First, in the liability opinion this Court did not find any evidence of bad faith, intentional discrimination, or class-wide discrimination.

325. While it is true that the practices resulting in a discriminatory impact continued over a substantial period of time, the discrimination was based on an honest if misguided belief, that USS was not discriminating against blacks in general, and in particular, against black applicants at the P & M division of the Fairless plant.

326. Next, race-conscious affirmative measures in this case would "unnecessarily trammel" the rights of the current inactive USS P & M workers (1,486 individuals) who, as USS workers on layoff, have recall rights for 5 years. *See United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). This union-negotiated contract right is a bona fide seniority-like arrangement, not the result of any discriminatory practices by USS. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (Court held that district court could not modify a consent decree, entered without a finding of intentional discrimination, in such a manner as to override a bona fide seniority system). Post-*Stotts*, the Third Circuit has limited the decision to its facts. *See Pennsylvania v. International Union of Operating Engineers*, 770 F.2d 1068, 38 Fair Emp. Prac. Cas. (BNA) 673 (3d Cir. 1985), *cert. denied*, 54 U.S.L.W. 3461 (U.S. Jan. 14, 1986); *Kromnik v. School Dist. of Philadelphia*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 782 (1985). Similarly, there is also a legitimate contract right to transfer within USS before looking outside the company.

327. Moreover, the injunctive relief granted, in combination with the monetary relief, should make plaintiffs whole, as well as prospectively ensure qualified black applicants access to the Fairless Hills P & M division. To

go further at this stage would go beyond the scope of the liability opinion.

328. In addition, because USS will not, in all likelihood, resume hiring until 1990 at the earliest, no interim hiring goal is necessary to immediately safeguard against the use of subjective criteria.

329. In the *Sheet Metal Workers* case, the Supreme Court noted that race-conscious hiring is still the exception, and not the rule. Slip op. at 50. The Supreme Court cautioned that a court should

> take care to tailor its orders to fit the nature of the violation it seeks to correct. *Id.* at 50-51.[48]

[48] "While the circuit courts of appeals ahve indicated that they possess [the] power [to award race-conscious affirmative relief], they have been reluctant to exercise it. The federal appellate courts have preferred to issue less harsh orders such as recruiting and posting of notices of vacancies. They have tended to impose hiring orders only after employer recalcitrance has been demonstrated." Blumrosen, 34 Rutgers L.Rev., at 41. See also Edwards & Zaretsky, Preferential Remedies for Employment Discrimination, 74 Mich. L. Rev. 1, 6-7 (1975).

XI. Costs

330. USS shall bear the costs of distributing notice of the Court's opinions and damages to the class members. Counsel shall agree on the method and wording of the notice within 30 days from the date of this opinion. *Pennsylvania v. Local 542, International Union of Operating Engineers*, 502 F.Supp. 7, 16 (E.D. Pa. 1979) (Title VII class action alleging race discrimination), *aff'd mem.*, 648 F.2d 922 (3d Cir. 1981) (en banc).

331. Within a reasonable time period (agreed upon by counsel), after due notice has been completed, the class shall be closed.

332. Counsel shall thereafter arrange for *prompt* distribution of damages to the identified class members.

CONCLUSIONS OF LAW

1. Unsuccessful applicants for summer positions are included in the class of plaintiffs.

2. The decertification notice sent in connection with *Dickerson v. United States Steel Corp.*, 13 Empl. Prac. Dec. (CCH) ¶11,311 (1976), did not preclude unsuccessful applicants for P & M jobs in 1972, 1973 and 1974 from recovering damages in this case.

3. The proper group of USS employees to refer to when measuring what class members would have earned at USS, had they been hired, is all the P & M employees USS did hire in place of the class members.

4. USS is not entitled to a credit against damages for the two years (1975 and 1976) in which it consciously hired blacks in excess of their proportion in the applicant pool. 570 F.Supp. at 261 (No. 52), 276-77.

5. USS is not entitled to a credit against its damages for years in which the outside wages of members of any year class exceeded the gross wages that they would have earned at USS. Outside wages were calculated on a year-by-year basis. When outside wages exceed USS wages, the result is that the plaintiffs suffered no damages that year. Those earnings do not reduce damages otherwise due.

6. Plaintiffs are entitled to mitigated back pay in the amount of $7,721,755. (Ex. P-238).

7. Plaintiffs are entitled to damages for lost fringe benefits. Those fringe benefits for which damages shall be

awarded are insurance, including life insurance, hospitalization, physicians' services, major medical, sickness and accident, dental and vision, and pension, workers' compensation, unemployment compensation, FICA and Supplemental Unemployment Benefits (SUB). The amount of mitigated fringe benefits to which plaintiffs are entitled is $4,676,173. Plaintiffs total damages for back pay are $12,397,928.

8. Plaintiffs have failed to prove with sufficient specificity that they are entitled to an award of front pay to compensate them for economic losses they may continue to suffer after the date of this judgment.

9. Plaintiffs are entitled to an award of prejudgment interest, computed for each year class from the time that defendant was found liable. The rate of interest to be applied shall be that which was prescribed from time to time by the Internal Revenue Service in 26 U.S.C. §6621. Interest shall be compounded quarterly from July 18, 1983 until the date of this award.

10. Plaintiffs are entitled to an award of post-judgment interest at the federal statutory rate from the date of this award until the judgment is satisfied.

11. Plaintiffs are entitled to injunctive relief, the terms of which are set forth in the accompanying Order.

Clarence C. Newcomer, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELBERT G. GREEN and
ROBERT DANLEY, Individually
and as representatives of
persons similarly situated

v.

UNITED STATES STEEL
CORPORATION

CIVIL ACTION
NO. 76-3673

PERMANENT INJUNCTION

On July 18, 1983, this Court found defendant United States Steel Corporation (USS) in violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000(e) *et seq.*), for engaging in race discrimination against a class of black persons who unsuccessfully sought entry-level labor employment in the production and maintenance (P & M) department of USS's Fairless Hills, Pennsylvania plant at any time between July 11, 1972 and December 31, 1974, and between January 1, 1978 and December 31, 1979. *Green v. United States Steel Corp.*, 570 F.Supp. 254 (E.D. Pa. 1983). This Court has determined that the entry of a permanent injunction is necessary to ensure USS's compliance with Title VII.

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. **Definition**—For purposes of this injunction, the following definition shall apply: "P & M" refers to the Production and Maintenance department of the USS facility in Fairless Hills, Pennsylvania and excludes Trenton hires,

nurses, plant guards, trade and craft hires, and clerical and technical hires.

2. **General injunction**—USS, its directors, officers, managerial and supervisory employees, successors and assigns, and those acting on behalf of USS in employment matters are permanently enjoined and restrained from (i) discriminating in any aspect of employment on the basis of race, color, or national origin with respect to P & M labor hiring; (ii) refusing or failing to fully implement, or to participate and cooperate in the implementation of, the provisions set forth in this decree; and (iii) discriminating or retaliating in any manner against any applicant or employee because of the filing of a charge, the giving of testimony or assistance, or the participation in any manner in an investigation, proceeding or hearing under Title VII or any other anti-discrimination law or ordinance.

3. **Announcements of job openings**—In order to ensure that minorities receive proper notification of future employment opportunities at the Fairless Hills facility, USS shall take reasonable steps to publicize P & M labor job openings through *e.g.*, advertisements in the help-wanted sections of newspapers in the Philadelphia, Pennsylvania and Trenton, New Jersey areas oriented toward the minority community, notices to local minority groups and submission of announcements to radio stations in the Philadelphia and Trenton areas.

4. **Employment selection criteria**—USS shall not use subjective employee selection criteria when filling P & M labor positions unless such criteria have been validated in accordance with the Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedures 1978," 29 C.F.R. §§1607.1 - 1607.18

(1985), or unless USS can establish that such procedures have no disparate impact on minorities.

5. **Centralized hiring**—To ensure that USS's employment practices are properly implemented, P & M labor hiring decisions shall be made by employees in the Personnel Department who have received periodic instruction on the proper application of non-discriminatory USS hiring practices.

6. **Records**—USS shall maintain the following records for at least five years after they are created:

(a) All applications for P & M labor positions in the P & M category;

(b) All job application logs prepared by USS with respect to P & M labor positions;

(c) Monthly summaries of the racial composition of the P & M applicant pool;

(d) Monthly summaries, by race, of USS's hiring for P & M positions;

(e) All EE0-1 forms and other documents pertaining in whole or in part to P & M labor positions submitted to the EEOC, the Office of Federal Contract Compliance, the Pennsylvania Human Relations Commission, and the New Jersey Department of Law and Public Safety, Division on Civil Rights;

(f) All documents pertaining to any test or other selection criteria used by USS to select applicants for P & M labor positions; and

(g) Documents used in or reflecting the periodic training on non-discriminatory hiring given to USS personnel with responsibility for P & M labor hiring.

7. **Reports**—With respect to P & M labor positions, USS shall furnish to the Court and plaintiffs' counsel on or before March 1 of each year a written report containing at least the following information about the preceeding calendar year (to the extent applicable, in a given year):

(a) USS's employment selection criteria:

(1) Copies of any written tests used during the reporting year. If a selection procedure other than a written test is employed, include a written description of the procedure;

(2) The pass/fail rates, or other results obtained from the written test or other selection procedure, broken down by race, during the reporting year; and

(3) All validation studies or other data demonstrating the job relatedness, or lack thereof, of the USS employment practices used during the reporting year. If no studies or other data exist, that fact shall be stated and USS shall prepare and submit a timetable for obtaining such studies or data.

(b) Minority applications and hiring:

(1) Information, broken down by race, regarding the number of applications submitted and the number of persons hired for P & M labor positions during the reporting year;

(2) Copies of all notices sent (pursuant to paragraph 3 of this injunction) to newspapers, radio stations, minority groups, and employment agencies (including the Bureau of Employment Security) announcing P & M labor job openings.

(c) Hiring personnel:

(1) The name and title of all persons who during the reporting year had authority to make hiring decisions for P & M labor positions and the names of all persons who were responsible for implementing USS's employment practices;

(2) A description of the instruction and training provided during the reporting year to each person listed in subparagraph (c)(1) with respect to the meaning and application of this injunction and non-discriminatory hiring policies; and

(3) The name and title of the person designated by USS to be responsible for its compliance with the terms of this injunction.

(d) USS shall furnish these yearly reports through 1996, at which time, upon petition by USS and based upon an appropriate review of the status of the case at that date, the Court will determine whether further reporting is necessary.

8. **Continuing jurisdiction**—This Court shall retain jurisdiction over this action to ensure USS's compliance with the terms of this permanent injunction.

AND IT IS ORDERED.

Clarence C. Newcomer, J.

Dated: August 1, 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELBERT G. GREEN and ROBERT DANLEY, Individually and as representatives of persons similarly situated v. UNITED STATES STEEL CORPORATION	**CIVIL ACTION NO. 76-3673**

ORDER

AND NOW, this 1st day of August, 1986, in accordance with the accompanying Findings of Fact and Conclusions of Law, it is hereby Ordered that plaintiffs are awarded damages in the amount of $12,397,928, plus prejudgment interest to run from July 18, 1983 (under 26 U.S.C. §6621), plus postjudgment interest at the federal statutory rate until the judgment is satisfied.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.

APPENDIX F

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 86-1554 & 86-1568

GREEN, ELBERT G., and DANLEY, ROBERT
Individually and as representatives
of persons similarly situated
Appellants in No. 86-1568

v.

USX CORPORATION, formerly
known as UNITED STATES STEEL CORPORATION
Appellant in No. 86-1554

(D.C. Civil Action No. 76-3673)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA and COWEN,
Circuit Judges.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied. Judge Greenberg would grant rehearing in banc.

BY THE COURT,

Dated: April 25, 1988 Circuit Judge

Supreme Court, U.S.
FILED
JUN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1816

In The

Supreme Court of the United States

October Term, 1989

USX CORPORATION,

Petitioner,

v.

ELBERT G. GREEN and ROBERT DANLEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether on remand the Court of Appeals' ruling that plaintiffs identified subjective interviews and proved that those interviews had a disparate impact on qualified black applicants satisfied the requirements of *Wards Cove Packing Co. v. Atonio,* 109 S. Ct. 2115 (1989).

2. Whether on remand the Court of Appeals' ruling that USX failed to produce any substantial evidence that there was a business justification for its discriminatory subjective interviews satisfied the requirements of *Wards Cove.*

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 7

I. ON REMAND THE COURT OF APPEALS CORRECTLY DETERMINED THAT PLAINTIFFS HAD BOTH IDENTIFIED INTERVIEWS AS THE CHALLENGED EMPLOYMENT PRACTICE AND PROVED CAUSATION 8

A. Plaintiffs Focused Their Disparate Impact Attack On USX's Subjective Interviews 9

B. Plaintiffs Proved That USX's Subjective Interviews Caused The Disproportionate Rejection Of Qualified Black Applicants 12

II. ON REMAND THE COURT OF APPEALS CORRECTLY HELD THAT USX FAILED TO PRODUCE ANY SUBSTANTIAL EVIDENCE THAT THERE WAS A BUSINESS JUSTIFICATION FOR ITS DISCRIMINATORY INTERVIEW PRACTICES 22

A. The Third Circuit Understood And Followed This Court's Distinction Between Burdens Of Production And Of Persuasion 22

B. USX Failed To Produce Any Substantial Justification For Its Discriminatory Practices 25

1. The "best qualified" excuse was baseless 25

2. The company's "drop out" theory was properly rejected 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Bazemore v. Friday, 478 U.S. 385 (1986) 20

Griggs v. Duke Power Co., 401 U.S. 424 (1971)..... 24

Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) 20

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) 24

Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) ..... *passim*

Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988) 7, 21

STATUTES AND REGULATIONS

Title VII, Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e (1982) ..... *passim*

29 C.F.R. Part 1607 (1989)..... 4

No. 89-1816

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October Term, 1989

USX CORPORATION,

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ELBERT G. GREEN and ROBERT DANLEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Elbert G. Green and Robert Danley, individually and as representatives of a class of persons similarly situated, respectfully ask this Court to deny the petition of USX Corporation for a writ of certiorari to review the February 23, 1990 remand ruling of the United States Court of Appeals for the Third Circuit.

COUNTERSTATEMENT OF THE CASE

This Title VII class action was filed in 1976 on behalf of about 12,000 black men and women who sought,

without success, unskilled laborer jobs at the Fairless Hills, Pennsylvania, steel plant of USX Corporation ("USX"). LFF 1 (69a).[1] The plaintiffs' qualifications for those jobs were at least as good as those of white applicants. LFF 63 (87a). Nonetheless, in the process of hiring thousands of laborers, USX rejected a disproportionately large number of qualified blacks, using a subjective interviewing process described by the courts below as "bizarre" and "unseemly." (51a).

When USX (then United States Steel Corporation) opened its large steel-making plant at Fairless Hills in the early 1950s, race discrimination in employment was widely practiced in this country. Despite passage of the Civil Rights Act of 1964, USX's work force at Fairless Hills continued throughout the 1970s to be over 91% white. LFF 82 (92a). The EEOC and the Attorney General of the United States sued USX in 1974 alleging a pattern and practice of race discrimination in violation of Title VII and Executive Order 11246. To settle that suit, USX entered into two consent decrees which permanently enjoined the company from discriminating in employment on the basis of race; restricted its use of unvalidated employee selection criteria; and prohibited destruction of hiring records for at least three years. LFF 42, 52 (80a, 82a). This class action was filed two years later.

During the 1970s USX's business prospered. Between 1972 and 1982, the company hired over 5,000 people to

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[1] As used herein, "LFF" refers to findings of fact in the District Court's liability decision; "Tr. I" refers to the liability trial transcript; and "(___a)" refers to a page from the opinions included in the appendix to USX's Certiorari Petition.

work as unskilled laborers, the most menial job in the Fairless Hills plant. LFF 60 (86a). Ninety percent of USX's laborer hiring during those years occurred in 1972, 1973, 1974, 1978 and 1979.[2] LFF 61 (86a).

To be hired as an unskilled laborer, USX required only that an applicant be at least 18 years old, able to read basic safety signs, and able to pass a physical exam. LFF 17 (73a). Indeed, in newspapers USX advertised the job as requiring nothing more than "common sense and a desire to work"; "no experience" was required. LFF 18 (74a). Black and white applicants possessed these modest requirements equally. LFF 17 (73a). USX expected newly hired laborers to acquire skills through on-the-job training or classroom instruction furnished by USX. LFF 18 (74a).

When any department at USX's steel plant needed unskilled laborers, the department foreman would submit a requisition to the personnel office. LFF 32 (77a). Personnel clerks would then call applicants in for interviews. *Id.* After a preliminary meeting in the personnel office,

---

[2] USX did virtually no hiring in 1975, 1980 and 1981. LFF 61 (86a). In 1976, USX faced Title VII suits, numerous EEOC charges of race discrimination, and close government scrutiny resulting from the consent decrees it had executed. The District Court found that to counter these pressures, USX deliberately increased the ratio of blacks it hired that year as laborers. LFF 52 (82a-83a). The qualifications of blacks applying that year were not better than in other years. *Id.* However, after 1976 USX again subjected qualified blacks to overwhelming employment barriers. As the trial court noted, "when the pressure to meet consent decree goals lessened after 1976, the rate of black hires quickly sank back nearly to its former level." (119a).

laborer applicants were sent to the department foremen for final interviews.[3] USX's foremen had unfettered power to accept or reject any applicant on the basis of "gut level" reactions developed in those final interviews. LFF 35 (78a); (117a).

USX claimed that during interviews its foremen assessed over twenty amorphous factors, many of which are not reflected in the applications, including "attitude," "initiative," "personality," "alertness," "intelligence," and "interest." LFF 39 (79a); (114a). Significantly, USX's own employment manual unequivocally banned the use during hiring of factors like "alertness" and "general ability." LFF 41 (80a). Moreover, the District Court found that the foremen were never "trained in any way as to what the different criteria meant or how to implement them uniformly." LFF 39 (79a). Although the consent decrees which settled the United States Government's Title VII suit specifically barred USX's use of unvalidated hiring criteria,[4] USX never examined whether the way its criteria were being interpreted correlated with job performance. LFF 42 (80a).

When any applicant was rejected during an interview, USX's personnel manual required the interviewer to

---

[3] The USX Petition (at 14 n.25) suggests that the preliminary interview in the personnel office was qualitative. The testimony of USX employees at trial disclosed that the function of the personnel office interview was to insure that the application was complete, and to describe the job, determine whether the applicant was interested in the position, and answer questions regarding pay, hours, benefits and so on. Tr. I 301-02.

[4] *See also* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607 (1989).

complete a special "Reviewer's Remarks" form to "substantiate conformity with the code of nondiscriminatory treatment . . . of applicants" and to provide "a later justification of selection should it be questioned." LFF 43 (80a). The District Court found that USX and its foremen "largely ignored" this requirement. *Id.*; (117a). Moreover, in violation of its consent decree obligations and EEOC requirements, USX destroyed the few "Reviewer's Remarks" forms that had been prepared after interviews. *Id.* As a result, the foremen at USX never had to justify why they favored white applicants over blacks.[5]

The evidence at trial showed that USX's unreviewed subjective interviews generated shocking racial imbalances. Qualified black men and women submitted 26% of the 50,000 applications considered for laborer jobs during the decade. LFF 58 (85a). The percentage of interviewees who were black (25% to 30%) was consistent with the percentage of blacks submitting applications. *See* discussion *infra* at 14. However, of the 5,000 unskilled laborers USX hired during the five most active years, only 16% were black.[6] LFF 60 (86a).

---

[5] The company improperly destroyed many other important employment documents, too. USX threw out 16,000 applications submitted by unsuccessful candidates between 1971 and 1975, when almost two-thirds of the class period hiring occurred. LFF 49, 50 (81a-82a). USX also destroyed the Job Applicant Log for 1972, LFF 57 (84a), and most of the Daily Call-In Logs showing the race of individuals scheduled for interviews. Tr. I 254-5.

[6] USX inaccurately contends that the "overwhelming majority" of blacks rejected during a foreman interview were

(Continued on following page)

The hiring disadvantage blacks suffered at USX was extraordinary. A white applicant for the laborer job enjoyed a 72% "edge" over an equally qualified black applicant. LFF 68, 119 (88a, 104a). If USX had hired in an even-handed way, more than 400 additional blacks would have been employed as laborers during the years in dispute. LFF 69 (89a). This "shortfall" had a statistical value more than 14 standard deviations below what one would expect if the employment decisions were neutral, which translates into less than one chance in 100,000 that USX's black hiring shortfall occurred by chance. *Id.*

After years of discovery and weeks of trial, USX was found liable for race discrimination. The trial court, and the Court of Appeals twice, concluded that USX's wholly subjective interviewing process discriminated against blacks under the disparate impact test of Title VII. Substantial monetary and injunctive relief was awarded to the class.

(Continued from previous page)

then sent to be interviewed, and were hired, by another foreman. USX Petition at 4 n.6. The District Court's factual findings are to the contrary – the USX personnel office only "sometimes" reviewed the reasons why a black applicant was rejected and only "possibly" referred the applicant for a second foreman interview. LFF 35 (78a). The trial court did not find that the "overwhelming majority" or any other number were actually hired by USX, and the statistics prove this could not be true, for if it were the percentage of blacks hired would have been on a par with the percentage of blacks interviewed (25% to 30%).

REASONS FOR DENYING THE WRIT

This fourteen-year old case does not merit a writ of certiorari. No unsettled question of federal law is presented. The Third Circuit was not, as USX claims, a renegade on remand; its unanimous decision comports with *Wards Cove* in every way. There is no split among the Circuit Courts on the issues this case presents. The analysis of USX's liability under Title VII is intensely factual.

For years, USX's principal defense in the courts below was that the disparate impact test could not be used to challenge its subjective hiring. Both the trial and appellate courts disagreed. In *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 991 (1988), this Court, too, ruled that "subjective or discretionary employment practices may be analyzed under the disparate impact approach . . . . "

USX then claimed that the plaintiffs had neither identified subjective interviews as an employment practice they were attacking nor established that the interviews caused the disproportionate exclusion of blacks.

One week after deciding *Wards Cove*, this Court granted certiorari, vacated the Court of Appeals' decision without opinion, and remanded the case to the Third Circuit for reconsideration in light of *Wards Cove*.

After carefully considering the teaching of *Wards Cove* and the extensive record in this case, the Court of Appeals again affirmed the disparate impact ruling in favor of the plaintiffs. USX now alleges that the Third Circuit flouted the instructions of this Court. Nothing could be further from the truth.

The Court of Appeals clearly understood and carefully honored *Wards Cove*. By insuring that the plaintiffs had identified subjective interviews and proved those interviews discriminated against blacks, and by determining that USX's attempted rebuttal was hollow, the Court of Appeals properly considered all pertinent *Wards Cove* issues. In reality, USX's dissatisfaction stems from the fact that the evidence proved it discriminated against blacks. There is nothing about this case that merits a writ of certiorari.

I. ON REMAND THE COURT OF APPEALS CORRECTLY DETERMINED THAT PLAINTIFFS HAD BOTH IDENTIFIED INTERVIEWS AS THE CHALLENGED EMPLOYMENT PRACTICE AND PROVED CAUSATION.

USX says that under *Wards Cove* "plaintiffs must *identify* the specific employment practice or practices they are challenging *and prove* that the identified practice or practices had a statistically significant adverse impact on a protected group." USX Petition at 11 (emphasis in original). USX also says that the Third Circuit, in its analysis on remand, "flagrantly disregarded" the mandate and "ignored the holding of *Wards Cove*." USX Petition at 10, 17.

USX's description of the two requirements that *Wards Cove* imposes upon a plaintiff is not controversial and merits no further discussion here. On the other hand, USX's description of the Third Circuit's analysis of the record below is plainly inaccurate. A fair review of the considerable evidence, briefs and court opinions in this case proves that the Court of Appeals properly applied

Wards Cove and that the plaintiffs (1) did challenge USX's use of subjective interviews and (2) did prove that USX disproportionately rejected qualified black job applicants at the interview stage.

A. Plaintiffs Focused Their Disparate Impact Attack On USX's Subjective Interviews.

In the two-week liability trial, the plaintiffs challenged USX's use of subjective interviews to winnow out qualified black applicants. Both the District Court and USX's trial counsel understood this. The claim of USX's current counsel that "plaintiffs never focused their attack on anything but the bottom line result," USX Petition at 15, is belied by the record.

In its remand opinion, issued only after USX, through briefs and extended oral argument, presented every *Wards Cove* challenge it could muster, the Court of Appeals confirmed that the plaintiffs' disparate impact attack was focused on subjective interviews.

> We also conclude that the class sufficiently identified the employment interview as a discriminatory hiring practice . . . . [T]he plaintiffs did present evidence isolating the interview as a discriminatory employment practice, as was recognized by both the district court and this court. The district court found that "the process by which [USX] divined who, among its applicants, were the best qualified was wholly subjective, consisting essentially of combining the gut reactions to the applicant of employees in the personnel office and one or more foremen in the plant." 570 F. Supp. at 269. On appeal, this court noted, and we still conclude, that "the class has sufficiently identified the interview process as

> one component of the USX hiring system that resulted in disparate hiring results." 843 F.2d at 1523.

(8a-9a) (footnote omitted).

The Court of Appeals' conclusion on remand was not based on fantasy. To illustrate, the plaintiffs' January 1983 post-trial brief said the following:

> Subjective criteria were used in an unsupervised manner by literally dozens of untrained plant foremen, operating with no regard for the few safeguards intended to prevent discriminatory hiring decisions.
>
> USS, in response to interrogatories, identified some twenty "factors" which it used to determine which of the applicants were to be hired. [Factors listed.] After a preliminary *interview* of applicants in the personnel office, USS sent the applicants to the operating department foremen or general foremen for *interviews*. Those *interviews* were conducted not only within the personnel office, but throughout the plant – by literally dozens of plant foremen, who could reject applicants for any reason they wanted.

Plaintiffs' Post-Trial Brief at 14-15 (emphasis added). Further:

> Company personnel certainly knew – by virtue of their monitoring of the DER [Daily Employment Report], which recorded the race of each day's hires – that only 17% of their hires were black. They also knew that 26% of their applications came from blacks; and that after preliminary screening some 25-30% of the applicants called in for *interview* were black. Yet when the 100 or more plant foremen had finished *interviewing* using the subjective hiring

> criteria, proportionately more blacks were being rejected than whites.

Id. at 50 (emphasis added). *See also* Tr. I 318, 488-490, 1563.

The District Court, too, understood that the plaintiffs were challenging USX's use of subjective criteria during interviews.

> It is also clear that the process by which USS divined who, among its applicants, were the best qualified was wholly subjective, consisting essentially of combining the gut reactions to the applicant of employees in the personnel office and one or more foremen in the plant.

LFF 110 (102a). Continuing:

> When making hiring decisions, USS's evidence was that its *interviewers* evaluated applicants using the following hiring criteria: education; work experience; attitude; initiative; personality; ability to take directions; alertness; intelligence; physical fitness (that is, physical restrictions); ability to communicate; military experience or training; vocational training; ability to meet work schedules; prior criminal record; familiarity with industrial or factory work; interest; prior employment history at Fairless Works; personal references; citizenship or alien status; having a relative in the USS work force; and age.

LFF 39 (79a) (emphasis added). And:

> Particularly when relatively vague subjective standards are given to a large number of individuals to be applied in whatever manner they see fit, with no systematic review to ensure fairness, the chances are great that conscious or unconscious racial bias on the part of some of those individuals will tinge the selection process.

(112a). *See also* LFF 31, 35-37, 43, 45, 50 and 52 (77a, 78a, 80a, 81a, 82a).

It is, therefore, clear that the plaintiffs targeted USX's subjective interviews. The Court of Appeals fully honored the "identification" requirement of *Wards Cove*. USX's assertion to the contrary is incorrect.[7]

B. Plaintiffs Proved That USX's Subjective Interviews Caused The Disproportionate Rejection Of Qualified Black Applicants.

The detailed evidence at trial showed that USX used a hiring process which involved a dozen steps, beginning with the submission of an application and ending with starting work. USS Trial Exhibit 19. To demonstrate that the disturbing racial disparity in USX's hiring occurred at step 10 – subjective interviews, the plaintiffs relied on thousands of USX employment documents, more than three days of testimony extracted from USX's own personnel officers, and the comprehensive testimony and written report of plaintiffs' expert statistician, as well as

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[7] The plaintiffs also challenged other aspects of USX's behavior, including the inappropriate destruction of crucial employment records, LFF 49 (81a-82a), the use of racial hiring quotas, LFF 53, 108 (83a, 100a), and giving preference to applicants with relatives in the USX work force. LFF 81 (92a). Nothing in *Wards Cove* says a Title VII plaintiff is limited to challenging only one aspect of an employer's business practices, and nothing in *Wards Cove* requires a plaintiff to prevail on every challenged issue in order to prevail on any. The evidence with respect to each challenged practice is to be considered separately. *See Wards Cove*, 109 S. Ct. at 2125.

effective cross-examination of USX's experts. The plaintiffs' proof also showed that the other eleven steps in USX's hiring process were neutral from a Title VII perspective and therefore did not affect the statistical conclusions drawn by the plaintiffs' expert.

Nonetheless, USX stubbornly contends to this Court, as it did unsuccessfully to the Court of Appeals, that the plaintiffs did not prove that USX's subjective interviews disqualified black applicants disproportionately.[8]

USX repeatedly claims that the plaintiffs' expert, Dr. Litwin, ignored all of the intermediate steps in USX's hiring process and considered only the first step (applications) and the last step (hires). USX Petition at 11, 13. This claim is misleading for two reasons. First, USX attempts to blink away the fact, as the plaintiffs' expert explained, that the company's destruction of documents made it impossible for him to perform a statistical analysis of several steps in USX's hiring process. Tr. I 816-17, 838-39.[9]

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[8] USX initially criticizes the plaintiffs for not introducing more detailed evidence comparing "the treatment of any applicant vis-a-vis another" or showing "individual instances of discrimination." USX Petition at 6 n.11. This argument is disingenuous for, as USX well knows, its employees refused in most instances to prepare the required reports of interviews which would have permitted the plaintiffs to expose specific disparities in USX's treatment of interviewees. Moreover, before the plaintiffs could obtain them, USX destroyed the few interview reports which were prepared. Both the District Court and the Court of Appeals made specific note of USX's improper destruction of interview documents. (22a).

[9] To illustrate the problem, USX's personnel chief testified that the Company did not retain documents showing who declined to be interviewed, who was interviewed, who

(Continued on following page)

Second, USX's assertion improperly ignores crucial evidence the plaintiffs did introduce through other witnesses, including knowledgeable USX personnel officers, which filled in the gaps left by the destroyed documents. When all of the plaintiffs' proof was considered, it was clear they had accounted for each of the twelve steps in USX's hiring process and proved that the interviews caused the disparity.

USX officials gave unchallenged testimony showing that throughout the class period the percentage of qualified blacks in the hiring process remained constant from the point of application (step 1) until the interview (step 10), and that nothing after the interviews (steps 11-12) had a disparate impact on blacks. The testimony also proved that blacks were disproportionately rejected during interviews.

Year	% of Applicants Who Were Black[10]	% of Interviewees Who Were Black[11]	% of Hires Who Were Black[12]
1972	20.3%	close to 30%	14.8%
1973	24.2%	close to 30%	16.1%
1974	21.4%	25%	13.1%
1978	29.1%	25-30%	19.1%
1979	26.4%	20-30%	19.1%

(Continued from previous page)

declined offers, who failed physical exams, or who accepted offers but never appeared for work. Tr. I 253-55, 300-01, 475-76.

[10] *See* applicant flow table prepared by District Court. LFF 58 (85a).

[11] *See* liability trial testimony of Larry Edwards, the head of the personnel department at USX's Fairless plant. Tr. I 478-482. USX failed to retain corporate records which would more precisely reveal the identity and race of each interviewee. Tr. I 254-55, 300-01.

[12] *See* hiring table prepared by District Court. LFF 60 (86a).

The following step-by-step review demonstrates that the plaintiffs addressed each aspect of USX's hiring process.

Step 1: (Applications) - Throughout the class period, 26% of the persons who applied for unskilled laborer jobs were black. (26a). Both the District Court and the Court of Appeals concurred that those black applicants possessed the job qualifications USX required. (21a; 119a).

Step 2: (Log-in) - Two senior USX personnel department officials, Larry Edwards and Mabel Williams, testified that when USX logged in employment applications, blacks were treated the same as whites. Tr. I 234, 526-27. The plaintiffs' statistical expert confirmed that blacks were not adversely affected by clerical errors in logging in their applications. Tr. I 767-69. The District Court so found. LFF 25 (75a).

Steps 3-4: (Review and classification) - On occasion, USX preliminarily reviewed applications to find specially qualified persons to fill openings in the separate, skilled craftsman job category. Tr. I 220, 359; USS Trial Exhibit 19. Because proportionately more white applicants than blacks possessed craftsmen skills, LFF 79, 80 (92a), this culling did not reduce (and probably increased) the ratio of

qualified blacks left seeking unskilled USX laborer jobs.[13]

Step 5: (Filing) - The next step in USX's hiring process involved the ministerial act of filing applications. LFF 29 (76a); (22a). This did not eliminate black applicants from consideration.

Step 6: (Requisitions) - Similarly, the submission by foremen of requisitions to hire unskilled laborers did not involve a hiring decision and thus did not disparately eliminate black applicants from consideration. LFF 32 (77a); (22a).

Steps 7-9: (Applications pulled; reviewed for minority representation; interviews scheduled) - Nor were blacks disproportionately excluded when USX pulled applications from the files, reviewed them, and scheduled interviews. As the Court of Appeals observed:

> Clerks . . . were instructed to "maintain a good mix" of applicants in the ready file. USX's personnel supervisor testified that he

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[13] Periodically, USX also reviewed newly submitted applications to find applicants with a relative in the USX work force. (21a). USX moved those ahead to the interview stage. LFF 27 (76a). As the Court of Appeals noted, "the practice of giving priority to applicants with relatives occurred *prior* to the interview." (37a) (emphasis in original). Because 25-30% of the persons USX actually interviewed were black and 26% of those applying were black, the family preference did not disparately impact the blacks who were interviewed.

> had instructed clerks that 20-30% of those persons *ultimately interviewed* should be minorities.

(22a) (emphasis added). *See also* LFF 31 (77a); table *supra* at 14; and Tr. I 360-61, 380-81, 479-481.

USX screened the applicants scheduled for interview to see that they "had the factors that we [USX] were looking for and were . . . the best qualified we thought we could get." Tr. I 294. USX's top personnel officer, Larry Edwards, testified that those "factors" did not disqualify blacks disproportionately. Tr. I 434, 477-78, 487, 517. Moreover, Mr. Edwards also testified that while USX's files did not show the number or identity of persons who rejected an invitation to interview, Tr. I 475-76, "there was no predictable [racial] pattern." Tr. I 485.[14] Thus, the Court of Appeals said:

> We still believe that USX's contention that blacks "dropped out" of the hiring process at a higher rate than whites was properly discounted by both courts.

(9a). In other words, steps 7 through 9 did not have a disparate impact on blacks.

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[14] Contrary to USX's assertion, USX Petition at 6, the plaintiffs' expert studied the limited evidence that was available concerning those who did not report for interviews and found the number (about one-half dozen) too small to be statistically meaningful. Tr. I 816-17.

Thus, the plaintiffs proved that the percentage of qualified blacks (25%-30%) who cleared the first nine steps of USX's employment process and were interviewed (step 10) was consistent with the percentage of qualified blacks (26%) who applied for work (step 1). The plaintiffs also proved that the percentage of blacks hired (16%) was significantly smaller than the percentage of blacks interviewed. Finally, the plaintiffs proved that the remaining two steps following the interviews did not account for USX's disproportionate exclusion of blacks.

Steps 11-12: (Offers extended; start work) - At trial USX contended that it was not the interview that disproportionately excluded blacks. Rather, the company claimed that a fair percentage of offers were extended to blacks, but the disparity arose either because blacks declined job offers more frequently than whites, or failed to pass the physical exam. The District Court rejected that contention. LFF 126 (106a). The Court of Appeals affirmed, finding that USX's "assertion that a disproportionate share of black applicants voluntarily withdrew from the hiring process is not supported by the evidence of record." (51a-52a). Similarly, with respect to the physical examinations USX required offerees to pass, the District Court found that "failures did not occur in a racially disparate pattern." LFF 63 n.2 (87a).

Having established that it was the interviews (step 10) that screened out blacks, the plaintiffs introduced testimony from their expert to prove that USX's rejection of qualified blacks was statistically significant. Because none of the eleven other steps affected the ratios, they did not affect the expert's analysis. His hypothesis was that if there were no racial bias, "the fraction of blacks and the fraction of whites proceeding every step of the way" would be proportionate. Tr. I 838. The trial court observed that "the basic premise of Dr. Litwin's statistical analyses [was] that, absent discrimination on the basis of race, one would expect black applicants to be hired in roughly the same proportion as their representation in the applicant pool." LFF 109 (100a).

Relying on what the District Court found to be the most accurate data available, LFF 55 (83a), the plaintiffs' expert used four different statistical methods to test USX's hiring, adjusting each method to take into account variations that could have affected the accuracy of his conclusions. Dr. Litwin considered the minimal job qualifications involved, LFF 63 (87a), the possibility of clerical errors in recording an applicant's race, LFF 56 (84a), the fact that some people submitted more than one application, LFF 88 (94a), the possibility that some applications were missing, LFF 94 (96a), the length of time USX treated applications as active, LFF 70 (89a), and other factors.[15] Each of Dr. Litwin's methods of statistical

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[15] The plaintiffs' expert explained that because USX had destroyed vast employment records, it was impossible for him to analyze other steps in the USX hiring process such as exactly how many offerees failed physical exams, Tr. I 817, or the

(Continued on following page)

analysis yielded standard deviations of greater than -4, and the overall shortfall of black hires exceeded -14 standard deviations. He, therefore, concluded that the racial disparity was certainly not due to chance. The trial court found plaintiffs' expert to be "a highly qualified statistician" whose "presentation and conclusions were credible." LFF 84 (93a).[16]

Ironically, USX's own statistical evidence at trial buttressed the plaintiffs' proof. As the District Court noted, "two defense experts . . . confirmed that the analyses [plaintiffs' expert] performed in relation to the overall P & M applicant pool were appropriate, and that the results he obtained were reliable, given his data and

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(Continued from previous page)

specific traits of those whose applications were destroyed by USX, Tr. I 838-39. In *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), this Court ruled that a plaintiff's statistical proof need not account for "all measurable variables thought to have an effect" on the employer's decision. And of course, an employer's improper destruction of valuable records cannot be used as criticism of the plaintiffs' expert. In any event, here the plaintiffs did account for all other steps through the testimony of USX employees.

[16] Although USX's appeal of the trial court's liability decision did not challenge the statistical conclusions plaintiffs' expert reached, (27a n.7), USX now argues that plaintiffs' statistical case was flawed because it only eliminated chance as the cause of the disparity. USX Petition at 13. Where tests of statistical significance eliminate chance as a possible explanation for a disparity in hiring, this Court has said that it is appropriate to conclude that the differences are attributable to discriminatory practices. *See Hazelwood School Dist. v. United States*, 433 U.S. 299, 308-09 n.14 (1977).

assumptions."[17] LFF 84 (93a). Especially damaging to USX was the fact that its leading expert, Dr. Welch, conceded that in USX's hiring system "being white gave an applicant an 'edge,' that is, an increased probability of being hired." LFF 119 (104a).

Thus, by identifying interviews as an employment practice they were challenging, and by proving through their expert and the mouths of USX's own employees and experts that the disparity in black hiring was caused by USX's use of subjective interviews, the plaintiffs made out a proper case of disparate impact against USX under *Wards Cove*.

After considering the detailed record and all of USX's arguments on remand, the Court of Appeals concluded that the class had:

> established that the interview had a "significantly disparate impact" on the employment opportunities for black and white applicants.

(8a). And further, that:

> The evidence establishes that the subjective interviews had a significantly disparate impact on blacks, as the percentage of successful black interviewees was significantly less than the overall percentage of successful interviewees.

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[17] There was really no way for USX to mount a legitimate attack on plaintiffs' statistics. Unlike the small sample in *Watson*, the statistics here were based on almost 50,000 applications. And, unlike the skilled positions sought in *Wards Cove*, there were no meaningful USX job qualifications for laborers, so the plaintiffs' statistics were not tainted by individuals unsuited for the job.

(9a). In so doing, the Court of Appeals paid full respect to the requirements of *Wards Cove*.

II. ON REMAND THE COURT OF APPEALS CORRECTLY HELD THAT USX FAILED TO PRODUCE ANY SUBSTANTIAL EVIDENCE THAT THERE WAS A BUSINESS JUSTIFICATION FOR ITS DISCRIMINATORY INTERVIEW PRACTICES.

A. The Third Circuit Understood And Followed This Court's Distinction Between Burdens Of Production And Of Persuasion.

In *Wards Cove* this Court said that once a prima facie case has been established, "the employer carries the burden of producing evidence of a business justification for his employment practice." 109 S. Ct. at 2126. As to any proffered justification, the question is whether the challenged hiring practice "serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 2125-26. The court must engage in

> a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices.

Id. at 2126.

The *Wards Cove* ruling signaled a change in the allocation of burdens of proof in disparate impact cases. The employer must now "produce evidence" of justification, but no longer needs to prove that its practice is essential or indispensable. The burden of persuasion remains always with the plaintiff. 109 S. Ct. at 2126.

The certiorari petition incorrectly argues that the Third Circuit disregarded *Wards Cove* and imposed upon USX the "burden of proof" or "burden of persuasion" regarding business justification. USX Petition at 17-22. In fact, the Third Circuit understood that USX bore only a burden of production, and properly held that USX was unable to satisfy even that burden.

At trial USX offered two theories why its subjective interviews disproportionately excluded blacks: (1) "the class members' qualifications were less than those of the applicants ultimately hired; and (2) . . . a greater proportion of black applicants voluntarily 'dropped out' of the hiring process . . . . " (49a). Both the District Court and the Third Circuit concluded that these excuses were "wholly without merit." (50a).

Revisiting this question on remand, the Court of Appeals' analysis was again correct and to the point:

> Finally, although *Wards Cove* may have reduced the employer's burden of showing a legitimate, non-discriminatory reason for the challenged practices, we perceive no reason to disturb the district court's and our own, prior rejection of USX's assertion that the subjective criteria enabled it to identify the "best qualified" applicants for the essentially unskilled positions. 570 F. Supp. at 275-76; 843 F.2d at 1529. We still believe that USX's contention that blacks "dropped out" of the hiring process at a higher rate than whites was properly discounted by both courts. 570 F. Supp. at 271; 843 F.2d at 1529-30. Although *Wards Cove* may have relaxed the employer's burden to rebut the plaintiff's *prima facie* case, we do not read the decision as requiring us to accept at face value an employer's explanations of the adverse impact

> of its hiring practices on blacks. As the *Wards Cove* Court stated, "[a] mere insubstantial [business] justification . . . will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices." 109 S. Ct. at 2126.

(9a-10a).

The Third Circuit's reasoning tracks *Wards Cove* precisely. It comports with this Court's consistent view that, to rebut a prima facie case, an employer must offer evidence having some substance. As stated in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981), the employer's "explanation of its legitimate reasons must be clear and reasonably specific."

While the plaintiffs always bear the ultimate burden of proof, an employer cannot rebut a prima facie case merely by uttering some baseless theory. Plausible "evidence" is needed.[18] If the employer's rebuttal excuse is so weak that it collapses from its own weight, or is shown through cross-examination to be a "mere insubstantial

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[18] The courts below required no more of USX. The company's assertion, USX Petition at 17, that it was required to "prove" that its excuses were valid is not supported by the record. The standard employed by the District Court, citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), was that USX had "to explain" or make a "showing" that its subjective interviews served a legitimate business purpose. (116a). In *Wards Cove*, this Court pointed to the identical passage in *Griggs* in describing the employer's evidentiary burden. 109 S. Ct. at 2125-26. Similarly, the Third Circuit merely required USX to "articulate [ ] a sufficient non-discriminatory reason to rebut the inference that its hiring practice was discriminatory." (49a). USX was never required to shoulder the ultimate burden of proof.

justification," it is correct to conclude that the employer has neither satisfied its burden of production nor rebutted the prima facie case. When this failure occurs, the plaintiffs have established liability.

B. USX Failed To Produce Any Substantial Justification For Its Discriminatory Practices.

1. The "best qualified" excuse was baseless.

USX's first rebuttal argument was that although there were no meaningful job requirements, the company made substantive evaluations of laborer applicants and found that white applicants were better qualified than black applicants. This argument fails the test of *Wards Cove* because USX was unable to back it up with *any* plausible evidence. As the Court of Appeals concluded, "[t]he record is completely devoid of evidence supporting this contention." (50a).

Indeed, USX's own witnesses scuttled its "best qualified" claim. USX introduced a study performed by its expert, Dr. Finis Welch, in an attempt to show that the company's subjective hiring reflected differences in applicant qualifications rather than racial bias. The District Court described Dr. Welch's report this way:

> If the Winner/Loser study revealed anything about what [USX] looked for in its applicants, it showed that [USX's] conduct was bizarre. Dr. Welch found that an applicant who had spent 7 of the past 10 years working as a manufacturing operative had no better chance of hire at [USX] than a person who had never worked a day in his life. He found that an applicant with one year of experience as an assembly line worker in an ice cream plant was

> *more* likely to be hired by [USX] than an applicant with 10 years of experience as a steel mill laborer. He found that applicants who had a college degree or some college training had a reduced chance of hire at [USX], as did applicants who had clerical experience. Ironically, he found that being white gave an applicant an "edge," that is, an increased probability of being hired.

LFF 119 (104a) (emphasis in original). The trial court concluded that:

> The Winner/Loser study did not show any relationship between the variables Dr. Welch measured and successful performance on P&M jobs. It did not attempt to determine whether the multitude of criteria [USX] used were job-related. Nor did it purport to show that blacks were less qualified than non-blacks, under [USX's] or any other criteria.

LFF 121 (105a).

Against this record, it is disturbing that USX now asserts that the District Court made "findings and conclusions that USX's use of subjective criteria to obtain the best-qualified employees was justified." USX Petition at 20-21. Quite to the contrary, the District Court concluded that in rebuttal USX had done nothing more than "invoke the 'best qualified' standard" and had failed to make even a minimal "showing" that the criteria it used to select the "best qualified" correlated with job performance. (116a).

USX emphasizes the trite statement of its expert, Dr. Haworth, that it is a reasonable business practice for an employer to hire the best qualified applicants. USX Petition at 20-21. However, USX ignores the fact that her

observation was entirely in the abstract; it did not describe USX's actual practice. The District Court found that:

> Dr. Haworth did not address, however, whether the defendant accurately measured the extent to which applicants were qualified, or whether its system was designed to ensure fair and racially neutral application of those criteria. The evidence, on the contrary, was that application of defendant's "best qualified" criteria was left to up to 100 plant foremen, general foreman, and personnel office interviewers and clerks; that no systematic efforts were made to train these individuals in neutral application of the criteria, or to review the fairness of their decisions; and that, under the name of applying the "best qualified" standard, each individual decision-maker essentially simply consulted his or her "gut level" reaction to an individual applicant. Moreover, the one safeguard against discrimination that was built into the system – the requirement that a written record be kept of the reasons for an applicant's rejection – was largely ignored.

(116a-117a). Thus, the District Court obviously did not conclude that USX's use of subjective criteria "was justified." USX Petition at 20. Indeed, the District Court found that there was

> no evidence from which I could reasonably conclude that blacks, on the average, are less qualified to be laborers in steel mills than whites, and that defendant's selection process fairly determined this to be so. To the extent defendant's argument suggests I should take judicial notice of the inferior qualifications of blacks, it is morally and legally offensive.

(115a-116a).

The Third Circuit, too, concluded that "USX articulated no logically comprehensible standard that it used to identify applicants who were 'better qualified' to do the jobs for which USX was hiring"; that "the evidence that was presented by USX negated the [best qualified] contention"; and that "the [USX] hiring process was unseemly." (50a-51a).[19] The Court of Appeals' conclusion that "[t]he record is completely devoid of evidence supporting this [best qualified] contention," (50a), was both accurate and in full keeping with *Wards Cove*.

2. The company's "drop out" theory was properly rejected.

USX's second rebuttal claim was that over the full class period a disproportionately large number of black applicants voluntarily withdrew from the hiring process. USX introduced this theory through testimony from Robert Talley, a low-level employee with no statistical expertise, who claimed to have reviewed some hiring data for small segments of the years 1973 and 1974. On the basis of this shallow testimony USX claimed that throughout the decade it had offered blacks a statistically proportionate number of "job opportunities."[20]

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[19] As Justice Blackmun's concurring opinion in *Watson* noted, a prima facie case cannot be rebutted by "the bald assertion that a purely discretionary selection process allowed [it] to discover the best people for the job, without any further evidentiary support." 487 U.S. at 1009.

[20] The predicate of this claim is that a proportionate share of USX's laborer job offers went to black applicants (25% to

(Continued on following page)

The District Court deemed Talley's testimony "unreliable" because it was contradicted by USX's head of personnel, Larry Edwards, who said that "there were no reliable [USX] records from which rates of applicant drop-outs or failures of physical exams could be determined." LFF 127 (106a). Edwards also testified that in his experience the "phenomenon of 'dropping out' during the interviewing process, or after a job offer had been extended, occurred 'across the board,' and . . . did not occur disproportionately often among blacks." *Id.* The trial court further cited testimony from the plaintiffs' expert which exposed the basic flaws in Talley's theory. LFF 130 (107a-108a).[21]

The District Court therefore concluded that USX's "drop out" theory "has not explained the statistically significant shortfall in black hiring for entry level P & M jobs . . . . " LFF 132 (108a). The Third Circuit agreed that the "drop out" excuse was "not supported by the evidence of record." (51a-52a). Indeed the Court of Appeals characterized USX's theories as "pretextual rationalizations for discriminatory hiring." (52a).

Thus, USX failed in the rebuttal stage to "produce evidence" to explain its biased hiring practices. It offered only an "insubstantial justification," which satisfied

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30%), which is inconsistent with USX's first rebuttal excuse that it hired only the "best qualified" and that, as a result, fewer black applicants (16%) were hired.

[21] This finding of fact exposes the falsehood in USX's assertion that "at no point [during trial] did they [plaintiffs] present any evidence . . . of the dropout rate among applicants." USX Petition at 7.

neither the requirements of *Wards Cove*, 109 S. Ct. at 2126, nor the courts below. USX's failure to rebut was not because of any legal error by either the District or Circuit Court. It was because USX had no legitimate excuse for its biased hiring.[22]

CONCLUSION

The Court of Appeals, on remand, properly followed *Wards Cove* and correctly held, after reviewing the extensive record, that the plaintiffs proved that USX's subjective interviews discriminated against thousands of black applicants. There is no reason for this Court to become further immersed in the factual details of this case. The writ should be denied.

Respectfully submitted,

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[22] Because USX did not rebut the prima facie case, there is no need to examine the *Wards Cove* issue of whether plaintiffs could prove that another employee selection device, lacking disparate impact on blacks, would equally serve USX's legitimate employment goals. USX's criticism that plaintiffs "presented absolutely no evidence of other selection devices . . . ", USX Petition at 7, is misplaced.

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No. 89-1816

In the Supreme Court of the United States

October Term, 1989

USX CORPORATION,
Petitioner,

v.

ELBERT G. GREEN and ROBERT DANLEY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Reply Brief of Petitioner

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The purpose of this Reply Brief is to respond to certain arguments raised in Respondents' Brief in Opposition.[1]

Respondents' Brief in Opposition only serves to demonstrate that the Third Circuit merely rubber-stamped its vacated decision, in which it found USX liable based on bottom line statistics, and paid lip service to the requirement, under *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115 (1989), that Plaintiffs identify and statistically isolate the challenged employment practice.

What Plaintiffs do not say in their Brief in Opposition is far more significant than what they *do* say. Plaintiffs tacitly admit that their statistician never discussed the statistical impact of USX's interview process. Plaintiffs also concede by their silence that the District Court never made any finding on the statistical effect of USX's interview process. While the Brief in Opposition is replete with sweeping claims that Plaintiffs showed it was the interview process that caused the bottom line disparity, none of those claims are followed by a citation to any of the District Court's 133 findings of fact in its liability decision (App. D, 69a-108a).[2]

Plaintiffs attempt to cover up the lack of requisite proof below by putting forth a lengthy, convoluted claim that they statistically isolated the interview process by eliminating the statistical effect of *all* of the other many

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[1]There are no amendments to the Rule 29.1 list of parents and subsidiaries set forth in the Petition for a Writ of Certiorari at note 1.

[2]For example, on page 6 of their Brief in Opposition, Plaintiffs make the bare assertion that "[t]he trial court . . . concluded that USX's wholly subjective interviewing process discriminated against blacks . . ." but, of course, provide no citation to the District Court's decision in support of that assertion. *See also* Brief in Opposition at 13, 14 and 18.

steps in USX's hiring process. Brief in Opposition at 12-21.[3] Again, there was no such testimony by plaintiffs' statistician nor any such finding by the District Court. The linchpin of Plaintiffs' theory that they isolated the interview process is Larry Edwards' statistically meaningless ("close to 30%," "20-30%"[4]), "guesstimates"[5] about the number of blacks invited to schedule interviews. Not even the Third Circuit relied on these "guesstimates" to justify its conclusory statement that the interview process caused the bottom line statistical disparity.[6] By resorting to such after-the-fact mischaracterizations of the record in order to

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[3]Plaintiffs also argue in their Brief in Opposition at 9-12 that they focused on the interview process at trial, and resort to quoting extensively their post-trial brief in support of this argument. USX does not deny that Plaintiffs pointed accusatorily at trial to USX's use of subjective interviews, just as they pointed to USX's use of minimum hiring goals and its preference for relatives. The problem is that Plaintiffs only offered one set of bottom line statistics rendering it impossible for the District Court to make any findings about the statistical impact of any given aspect of USX's hiring process, including the personnel office interviews, the foremen interviews or the interview process as a whole.

[4]In 1978 and 1979, 19.1% of the hires were black. LFF 60 (App. D, 86a). Obviously, whether black interviewees were 20% or 30% is significant.

[5]*See, e.g.*, Tr. I at 479a ("I must repeat I'm not precise on these matters. These are off the top of my head, these statistics."). Plaintiffs' own chart on page 14 of their Brief in Opposition is inconsistent with their claim that the percentage of blacks in the hiring process remained constant until the interview stage.

[6]It is also telling that, in order to argue that the steps after the interview did not cause the bottom line disparity, Plaintiffs stoop to relying on the finding that USX failed to *prove* that blacks declined job offers more often than whites. Brief in Opposition at 18. This does not by any means establish that Plaintiffs proved the opposite to be true. Plaintiffs offered no evidence on the rate that blacks and whites dropped out of the process after the foreman interview stage, for example, by not scheduling a physical, by failing the physical or by not responding to a call to commence work.

bolster the Third Circuit's conclusion, Plaintiffs have highlighted that court's utter disregard for the requirements of *Wards Cove* and for this Court's remand Order.

Plaintiffs also try to divert attention from their failure to present the proof *Wards Cove* requires by painting USX as the "big, evil corporation," *see, e.g.*, Brief in Opposition at 2,[7] and utterly ignoring the District Court's holding, now affirmed by the Third Circuit, that Plaintiffs failed to establish a prima facie case of intentional discrimination under the disparate treatment model.[8] This tactic too reveals the lack of substance to Plaintiffs' arguments in opposition to USX's Petition for a Writ of Certiorari.

Throughout their Brief in Opposition, Plaintiffs attempt to blame USX for their utter failure to identify and isolate any offensive component of USX's hiring process. *See, e.g.*, Brief in Opposition at 5, 13 n.8, 13-14 n.9, 19-20 n.15.[9] This is a disingenuous after-the-fact rationalization. Plaintiffs did not attempt to isolate the interview process using the tremendous amount of information that

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[7]The consent decrees Plaintiffs cite on page 2 of their Brief in Opposition contained non-admissions of liability and were entered into by nine major steel companies, not USX alone. P-112 (J.A. 448-475).

[8]The District Court also found that "[t]here is no evidence from which I could find that any of the US[X] personnel office employees who testified harbor animus against blacks or are likely to have intentionally discriminated against black applicants," LFF 133 (App. D, 108a), and that "defendant's lack of a hostile, discriminatory motive is unchallenged on this record." (App. D, 121a).

[9]In note 15 of their Brief in Opposition, Plaintiffs misrepresent the record. Plaintiffs' expert never testified that his failure to study any of the steps in USX's hiring process was "because USX had destroyed vast employment records," as Plaintiffs claim. At Tr. I 817, Plaintiffs' statistician testified only that he did not have information on which applicants failed the physical. There is no evidence or even suggestion in the record that such records ever existed and were destroyed by USX.

was available to them.[10] They chose to rely instead on bottom line statistics. If Plaintiffs really had tried to prove what caused the overall disparity but were prevented from doing so because of USX's inadvertent destruction of certain records,[11] there surely would be a finding to that effect by the District Court. There is none.

Respondents' Brief in Opposition also serves to demonstrate that the Third Circuit improperly imposed on USX the burden to prove that a factor other than race caused the bottom line statistical disparity. Rather than addressing the pertinent inquiry of whether USX produced a business justification for its use of interviews, Plaintiffs regurgitate the District Court's findings, and Third Circuit's findings in its vacated decision, that USX failed to *prove* that the explanations it offered for the statistical disparity were correct. Brief in Opposition at 22-30. Moreover, the Third Circuit findings that Plaintiffs cite appear

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[10]Plaintiffs' expert failed to analyze, for example, the Daily Call-In List (reflecting the names of applicants scheduled for interviews, the dates of their interviews and, after 1974, their race) or the Did Not Start/Did Not Report ("DNS/DNR") file (the records reflecting which applicants did not report for interviews or did not start work as scheduled after accepting a job offer). LFF 33, 34 and 55 (App. D, 78a and 83a-84a). Plaintiffs claim that they did not have this information (Brief in Opposition at 13-14 n.9) is simply not true. *See* LFF 34 and 55 (App. D, 78a and 83a-84a).

[11]The only records USX inadvertently destroyed were employment applications from the portion of the class period prior to 1975 and interview sheets for unsuccessful applicants that were only occasionally created in the first place. (LFF 43, 49 and 50 (App. D, 80a, 81a-82a)). These would not have helped Plaintiffs isolate the effect of the interview process. The pre-1975 applications would have shed no light on what happened in any of the components of USX's hiring process after the first step (applications) and a valid sample of the interview sheets never existed. LFF 43 and 50 (App. D, 80a and 82a). Indeed, Plaintiffs used neither the available applications from 1975 on nor the interview sheets for successful applicants.

in the court's discussion of Plaintiffs' disparate treatment claim, *see* App. C, 49a-52a, which the Third Circuit disavowed in its subsequent decision, *see* App. B, 10a-13a.

Thus Plaintiffs have entirely ignored the only pertinent inquiry. Under *Wards Cove*, USX was not required to prove causation, Plaintiffs were. USX was only required to produce evidence that its use of interviews was job-related—the District Court found that it was.[12]

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[12] *See* quotations from the District Court's decision on pages 20-21 of USX's Petition for a Writ of Certiorari.